DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-9012
Title: Benjamin Robers, Petitioner
v.
United States
Docketed: February 28, 2013
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (10-3794)
Decision Date: September 14, 2012
Rehearing Denied: November 28, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 26 2013	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 1, 2013)
Mar 28 2013	Order extending time to file response to petition to and including May 1, 2013.
Apr 25 2013	Order further extending time to file response to petition to and including June 3, 2013.
Jun 3 2013	Brief of respondent United States in opposition filed.
Jun 12 2013	Reply of petitioner Benjamin Robers filed.
Jun 13 2013	DISTRIBUTED for Conference of September 30, 2013.
Oct 7 2013	DISTRIBUTED for Conference of October 11, 2013.
Oct 15 2013	DISTRIBUTED for Conference of October 18, 2013.
Oct 21 2013	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 19 2013	Motion to appoint counsel filed by petitioner Benjamin Robers.
Nov 21 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 13, 2013.
Nov 21 2013	The time to file respondent's brief on the merits is extended to and including January 21, 2014.
Nov 25 2013	SET FOR ARGUMENT ON Tuesday, February 25, 2014
Dec 3 2013	Record received from U.S.C.A. 7th Circuit is electronic.
Dec 4 2013	Motion DISTRIBUTED for Conference of January 10, 2014.
Dec 13 2013	Joint appendix filed. (Statement of costs filed.)
Dec 13 2013	Brief of petitioner Benjamin Robers filed.
Jan 9 2014	CIRCULATED
Jan 13 2014	Motion to appoint counsel filed by petitioner GRANTED. Christopher Donovan,

	Esquire, of Milwaukee, Wisconsin is appointed to serve as counsel for the petitioner in this case.
Jan 14 2014	Proposal from counsel for petitioner to lodge copies of two case files from underlying civil cases.
Jan 21 2014	Brief of respondent United States filed. (Distributed)
Jan 30 2014	The Clerk has approved the submission of petitioner's proposed lodging.
Jan 31 2014	Lodging received and distributed.
Feb 14 2014	Reply of petitioner Benjamin Robers filed. (Distributed)
Feb 25 2014	Argued. For petitioner: Jeffrey T. Green, Washington, D. C. For respondent: Sarah E. Harrington, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
May 5 2014	Adjudged to be AFFIRMED Breyer, J., delivered the opinion for a unanimous Court. Sotomayor, J., filed a concurring opinion, in which Ginsburg, J., joined.

PETITION FOR WRIT OF CERTIORARI

No. 12-

IN THE

Supreme Court of the United States

BENJAMIN ROBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER DONOVAN
PRUHS & DONOVAN, S.C.
757 N. Broadway
Milwaukee, WI 53202

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SUPREME COURT
PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

JEFFREY T. GREEN *
JOSH C. HESS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

February 26, 2013

QUESTION PRESENTED

Whether a defendant—who has fraudulently obtained a loan and thus owes restitution for the loan under 18 U.S.C. § 3663A(b)(1)(B)—returns "any part" of the loan money by giving the lenders the collateral that secures the money?

PARTIES TO THE PROCEEDING

Petitioner is Benjamin Robers, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Benjamin Robers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming in part and vacating in part the order of the United States District Court for the Eastern District of Wisconsin, is reported at 698 F.3d 937. The opinion is reprinted in the Appendix to this Petition. Pet. App. 1a. The District Court's order is unreported and is also reprinted in the Petition Appendix. Pet. App. 47a.

JURISDICTION

The Court of Appeals entered its judgment on September 14, 2012. Pet. App. 45a. That court's order denying Mr. Robers's petition for rehearing was entered on November 28, 2012. Pet. App. 46a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 3663A of Title 18 of the United States Code provides, in relevant part:

a) [W]hen sentencing a defendant convicted of an offense described in subsection (c), the court shall order . . . that the defendant make restitution to the victim of the offense[.]

b) The order of restitution shall require that such defendant—

1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

A) return the property to the owner of the property or someone designated by the owner; or

B) if return of the property under subparagraph (A) is impossible, impractible, or inadequate, pay an amount equal to—

i) the greater of—

I) the value of the property on the date of the damage, loss, or destruction; or

II) the value of the property on the date of the sentencing, less

ii) the value (as of the date the property is returned) of any part of the property that is returned; . . . .

c)

1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, an offense—

A) that is—...

ii) an offense against property under this title, . . . including any offense committed by fraud or deceit[.]

STATEMENT OF THE CASE

The Mandatory Victim Restitution Act requires a defendant to pay restitution for property that victims have lost due to the defendant's fraud. 18 U.S.C.

§ 3663A(b)(1)(B), (c)(1)(A)(ii). But the Act also requires courts to reduce that restitution award if the defendant returns to the victims "any part" of the lost property. *Id.* § 3663A(b)(1)(B)(ii). In such cases, courts must reduce the award by the part's value "as of the date [the part] is returned." *Id.*

Here, Petitioner Benjamin Robers fraudulently obtained loans so he could buy two houses. Under § 3663A(b)(1)(B), he therefore owes the lenders restitution for the loan money. But Mr. Robers also surrendered to the lenders the houses' titles after he defaulted on the loans. The question here is whether Mr. Robers therefore returned a "part" of the lenders' money.

As the Seventh Circuit acknowledged expressly, that question divides the circuits. Three circuits have held that defendants like Mr. Robers do return a part of the loan by surrendering the houses, while at least four circuits have held the opposite. The issue is a recurring one, too, since this case is only one of many involving recently defrauded lenders. The Court should grant this petition to resolve this important split.

I. BACKGROUND OF THE CASE

A. Factual Background

In mid-2004, James Lytle and Martin Valadez conspired to defraud mortgage lenders. They planned to recruit "straw buyers" who would submit mortgage-loan applications with false information. Specifically, the buyers would overstate their incomes and misrepresent that they would repay the loans. Pre-Sentence Investigation Report at 3, *United States v. Robers*, No. 10-00095 (E.D. Wis. Oct. 12, 2010) [hereinafter PSR]. If the lenders approved the loans, the straw buyers would then buy houses from sellers

who agreed to pay "consulting fees" to Lytle and Valadez. PSR at 3. Lytle and Valadez would then let the straw buyers default on the loans.

In early 2005, a member of that conspiracy paid Mr. Robers $500 to be a straw buyer. PSR at 4. Mr. Robers, who made $7.25 an hour on a family farm, submitted a loan application on which he reported making $3,798 per month as a foreman for Titan Companies. PSR at 10; Loss and Restitution Memo., Exhibit 2 at 7, *United States* v. *Lytle*, No. 07-00113 (E.D. Wis. Apr. 30, 2008), ECF No. 22. Paragon Home Lending thereafter approved the application and loaned Mr. Robers $141,000. In March 2005, Mr. Robers used the money to buy a house at 911 Grant Street, Lake Geneva, Wisconsin. Loss and Restitution Memo., Exhibit 2 at 7, *United States* v. *Lytle*, No. 07-00113 (E.D. Wis. Apr. 30, 2008), ECF No. 22. Paragon then sold the loan note to Fannie Mae. Pet. App. 60a.

Several months later, a member of the conspiracy again paid Mr. Robers $500 to be a straw buyer. Pet. App. 87a.; PSR at 4. Mr. Robers submitted another loan application, this time reporting that he earned $7,000 a month as a furniture store's regional manager. Loss and Restitution Memo., Exhibit 2 at 6, *United States* v. *Lytle*, No. 07-00113 (E.D. Wis. Apr. 30, 2008), ECF No. 22. Challenge Financial Investors Corporation approved the application and loaned Mr. Robers approximately $330,000. PSR at 3; Pet. App. 93a. On June 30, 2005, Mr. Robers used that money to buy a house at 900 Inlet Shores Drive. Pet. App. 87a.; Loss and Restitution Memo., Exhibit 2 at 6, *United States* v. *Lytle*, No. 07-00113 (E.D. Wis. Apr. 30, 2008), ECF No. 22. The lender then sold the loan note to American Portfolio for $330,000. Pet. App. 105a–106a.

Mr. Robers defaulted on both loans. In February 2006, American Portfolio foreclosed and took title to the Inlet Shores house. Pet. App. 91a–92a, 98a. Then, in September of that year, Fannie Mae did the same for the Grant Street house. Pet. App. 61a–62a.; see also Landshark, Walworth County, WI, *available at* https://rodapps.co.walworth.wi.us/LandShark, Doc. No. 691127 (last visited Feb. 20, 2013) (subscription required).[1] Fannie Mae thereafter transferred the title to its loan insurer, Mortgage Guarantee Insurance Corporation, in exchange for $159,214.91. Pet. App. 65a-66a.

Mortgage Guarantee and American Portfolio initially kept the Grant Street and Inlet Shores houses. In mid 2007, the real estate market collapsed nationwide. Steven Gjerstad & Vernon L. Smith, *From Bubble to Depression?*, Wall St. J., Apr. 6, 2009, *available at* http://online.wsj.com/article/SB123897612802791281.html. Then, in August 2007, Mortgage Guarantee sold the Grant Street property for $118,000. Pet. App. 66a.; see also Landshark, Walworth County, WI, https://rodapps.co.walworth.wi.us/LandShark, Doc. No. 717620 (last visited Feb. 20, 2013) (subscription required). Likewise, in October 2008, American Portfolio sold the Inlet Shores Property for $164,000. Pet. App. 92a.

B. District Court Proceedings

A year and a half later, the government charged Mr. Robers with conspiracy to commit wire fraud.

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[1] The government's sentencing exhibits omit the foreclosure date and resale date for the Grant Street property. Those dates are publicly available, however, in county records on the website cited above. The government's sentencing exhibits do provide those dates for the Inlet Shores property.

See generally 18 U.S.C. § 371. The government alleged that Mr. Robers had conspired to borrow money fraudulently so he could buy the Inlet Shores house. Information, *United States* v. *Robers*, No. 10-00095 (E.D. Wis. May 18, 2010), ECF No. 1. Mr. Robers pled guilty. In the plea agreement, he agreed to pay restitution for the loans he used to buy both the Inlet Shores and the Grant Street houses. Plea Agreement, *United States* v. *Robers*, No. 10-00095 (E.D. Wis. May 18, 2010), ECF No. 2.

The district court thereafter held a hearing to determine how much restitution Mr. Robers owes under the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A. That statute requires a defendant like Mr. Robers, who commits fraud that "result[s] in . . . loss . . . of property," to pay the victim restitution in the amount of the loss. *Id.* § 3663A (b)(1),(B). That provision, the government argued at the hearing, required Mr. Robers to pay the outstanding balances on each loan, plus administrative costs: $500,952.18. Pet. App. 38a, 65a, 66a, 87a. The government acknowledged, however, that the Act also required the court to reduce the restitution judgment by "the value (as of the date the property is returned) of any part of the property that [Mr. Robers] returned." Government's Restitution Memo., *United States* v. *Robers*, No. 10-00095 (E.D. Wis. Nov. 20, 2010), ECF No. 12 (citing § 3663A(b)(1)(B)(ii)). The government therefore recommended reducing the restitution award by the amount that Mortgage Guarantee and American Portfolio eventually recouped by reselling the houses: $118,000 and $164,000, respectively. Government's Restitution Memo., *United States* v. *Robers*, No. 10-00095 (E.D. Wis. Nov. 20, 2010), ECF No. 12; Pet. App. 66a, 89a. Thus, the government proposed that Mr. Robers pay

$218,952.18 in restitution. Government's Restitution Memo., *United States* v. *Robers*, No. 10-00095 (E.D. Wis. Nov. 20, 2010), ECF No. 12.

Mr. Robers objected to the calculation. Among other things, he argued that the court should reduce the restitution award by the houses' values in 2006, when he surrendered the houses to the lenders, rather than in 2007 or 2008, when the lenders resold the houses. Pet. App. 99a–100a.; see also Defendant's Restitution Memo. at 6–7, *United States* v. *Robers*, No. 10-00095 (E.D. Wis. Nov. 18, 2010). He explained that the real-estate bubble had burst between those dates, so the later resale prices were too low. *Id.* But the Court rejected that argument and adopted the government's recommendation. Pet. App. 127a–128a.

C. Court Of Appeals Proceedings

Mr. Robers timely appealed. He again argued that § 3663A(b)(1)(B)(ii) required the district court to reduce the restitution amount by the value of the houses at the time he gave them to the lenders. Appellant's Brief at 21–27.

The Seventh Circuit reviewed the issue de novo and affirmed. Pet. App. 4a, 8a. The court noted that the restitution statute requires courts to reduce restitution awards only when the defendant returns a part of the property lost. Pet. App. 9a (citing § 3663A(b)(1)(B)). The property lost here, according to the court, was loan money, not houses. Pet. App. 9a–12a. The court therefore concluded that Mr. Robers had not returned any part of the lenders' property at the time he gave them the houses. And so the panel held that the district court was correct not to reduce the restitution award by the houses' values as of that time. Pet. App. 37a.

In so holding, the court expressly acknowledged both (i) that its conclusion "conflicts with the view" of three other circuits, and (ii) that the panel had "join[ed] the view" of three others. Pet. App. 20a, 37a.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S DECISION DEEPENED A SPLIT BETWEEN SIX OTHER CIRCUITS ON A RECURRING ISSUE OF NATIONAL IMPORTANCE

At least seven circuits disagree on the question presented. The Second, Fifth, and Ninth Circuits have held that such defendants do return a "part" of the lenders' property by surrendering title to the houses (or whatever collateral secures the loans). See *United States* v. *Yeung*, 672 F.3d 594, 604 (9th Cir. 2012) (citing *United States* v. *Smith*, 944 F.2d 618, 625 (9th Cir. 1991)); *United States* v. *Boccagna*, 450 F.3d 107, 112 n.2 (2d Cir. 2006); *United States* v. *Holley*, 23 F.3d 902, 915 (5th Cir. 1994) (interpreting identical provision in 18 U.S.C. § 3663(b)). On the other hand, the First, Third, Seventh, and Eighth Circuits (and the Tenth in two unpublished decisions) have held that a defendant does not return any part of the lenders' property in those circumstances. Pet. App. 10a-11a.; *United States* v. *Statman*, 604 F.3d 529, 538 (8th Cir. 2010); *United States* v. *Innarelli*, 524 F.3d 286, 294–95 (1st Cir. 2008); *United States* v. *Himler*, 355 F.3d 735, 745 (3d Cir. 2004); *United States* v. *Bizzell*, No. 92-6008, 1993 WL 411470, at *11 n.23 (10th Cir. Aug. 17, 1993) (interpreting identical provision in § 3663(b)). This 3-to-4 split is one the Court should resolve.

A. The Seventh Circuit's Decision Conflicts Directly With Decisions In Three Other Circuits

The Second, Fifth, and Ninth Circuits have held that a defendant like Mr. Robers does return a part of the lenders' property by giving those lenders the houses that secure the loans. *Boccagna*, 450 F.3d at 112 n.2; *Holley*, 23 F.3d at 915. Those courts agree with the decision below that the property lost (and the property that the defendant must return under § 3663A) is money, not houses. *Yeung*, 672 F.3d at 602; *Holley*, 23 F.3d at 915; see also *Boccagna*, 450 F.3d at 112 n.2. But they explain that surrendering the houses is the same as returning a "part" of the loan money. For two reasons. First, the houses contain the economic "value" that the loan money represented. *Holley*, 23 F.3d at 915 (internal quotation marks and citation omitted). Second, the victim lenders (and only the victim lenders) have the "ability to sell [the houses] for cash" once they "receive[] title" to the houses. *Yeung*, 672 F.3d at 604 (quoting *Smith*, 944 F.2d at 625). Those courts therefore reject the Seventh Circuit's holding below.

B. At Least Four Circuits Hold That A Defendant Like Mr. Robers Does Not Return Any Part Of The Loans By Surrendering The Houses

On the other hand, at least four circuits have held that a defendant like Mr. Robers does not return any part of the lenders' property by surrendering the houses to those lenders. The Seventh Circuit (and the Tenth Circuit, in an unpublished decision) held as much explicitly. Pet. App. 9a–10a.; *Bizzell*, 1993 WL 411470, at *11 n.23. It reasoned that the property lost, for purposes of § 3663A(b), is money, pure and simple. And so the court held that the defendant

must give the lenders money, not houses, in order to return any part of the property lost. Pet. App. 10a–11a., 30a; see also *Bizzell*, 1993 WL 411470, at *11 n.23. Thus the Seventh Circuit held that Mr. Robers returned the lenders' property only when the lenders eventually recouped their money by reselling the houses.

The First, Third, and Eighth Circuits have concluded the same, albeit implicitly. In cases like this one, they too hold that district courts may reduce the restitution award by the amount the victims eventually recoup by reselling the houses. *Innarelli*, 524 F.3d at 294–95; *Himler*, 355 F.3d at 745; *Statman*, 604 F.3d at 538; see also *United States* v. *Lipsey*, No. 11-1536, 2013 WL 386529, at *4–5 (10th Cir. Feb. 1, 2013).[2] Those courts' stated reason is that such an interpretation ensures that the restitution award is adequate to cover whatever loan balance remains after the lenders resell the houses. *Id.* But to adopt that interpretation, they must also agree with the Seventh Circuit that the defendant returned the victim's property only once the lenders resold the houses. Section 3663A(b)(1)(B)(ii) says to reduce the restitution award by the returned property's value "as of the date the property is returned," not "as of the date that will make the victims whole." Hence those three circuits join the

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[2] The Seventh Circuit cited a published Tenth Circuit opinion as taking the same position, *United States* v. *James*, 564 F.3d 1237 (10th Cir. 2009). Pet. App. 35a. But that case is distinguishable. There, the victim lenders never took title to the houses. *James*, 564 F.3d at 1240, 1244. Thus, the court had no occasion to decide whether district courts should reduce the restitution award by the houses' value as of the time the lenders took title, rather than the time the lenders eventually resold the property.

Seventh Circuit for all intents and purposes (as the Seventh Circuit itself acknowledged). Pet. App. 37a.

C. The Split Is Important

Moreover, the split is on an important issue. The same statutory language at issue here is also present in the statute governing permissive restitution, § 3663(b)(1)(B). And there is no reason to expect that the issue involves just a few cases. Between 2006 and 2010, borrowers obtained over $80 billion in mortgage loans by using fraudulent application data. See Federal Bureau of Investigation, *2010 Mortgage Fraud Report*, http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010 (Aug. 2011) District courts nationwide will therefore sentence many more defendants like Benjamin Robers. Those courts will likewise confront the same restitution issue regularly. In fact, the Tenth Circuit did just that earlier this month. See *Lipsey*, 2013 WL 386529 at *4–5. The Court's guidance is necessary to resolve this recurring conflict.

II. THE SEVENTH CIRCUIT'S DECISION IS INCORRECT

The Seventh Circuit held that Mr. Robers returned none of the lenders' money when he gave them title to the houses. Pet. App. 3a–4a., 43a–44a. But he did return a "part" of that money: The economic value that the money represented and that Mr. Robers transferred to the houses by buying them. *Holley*, 23 F.3d at 915; *Boccagna*, 450 F.3d at 112 n.2; see generally *Riha* v. *Jasper Blackburn Corp.*, 516 F.2d 840, 843 (8th Cir. 1975) ("The value of money is a representative one." (citation omitted) (internal quotation marks omitted)). Indeed, what Mr. Robers did—as Judge Easterbrook explained in a similar case—is "no different in principle from taking the

money from one of [the lenders'] bank accounts and [later] depositing it in another" of the lenders' accounts. *United States* v. *Shepard*, 269 F.3d 884, 887–88 (7th Cir. 2001). The decision below overlooks that economic reality.

The Seventh Circuit nonetheless says that a defendant may return a part of stolen property, for purposes of § 3663A(b)(1)(B)(ii), only by returning the same kind of property he took. Pet. App. 30a. Such a distinction might be sensible if Mr. Robers had taken a Monet and returned a house. But he took *money* and returned a house. Money's only purpose is to transfer a part of itself, its value, from one place to another: from a savings account to shares of stock, or from a lender's treasury to a house. See *Oxford English Dictionary*, Money, 3rd ed. 2002, *available at* http://www.oed.com.proxy.lib.umich.edu/view/Entry/121171?iaAdvanced=false&result=1&rskey=S7lAKX& (subscription required). Moreover, the Seventh Circuit's restrictive reading of the terms "part" and "property" in § 3663A(b)—to require the defendant to return exactly the same kind of property he took—gets things backwards. Courts construe ambiguous words against the government, not against defendants. See *Hughey* v. *United States*, 495 U.S. 411, 422 (1979). As a result, the Seventh Circuit misreads the statute.

The Seventh Circuit also says that its reading advances the statute's goal of making victims whole. Pet. App. 12a–13a.; see also *Himler*, 355 F.3d at 745; *Statman*, 604 F.3d at 538. Under that reading, courts reduce the restitution award only as of the time the lenders eventually resell the houses. By waiting until that point to reduce the restitution award, the court explains, district courts can select an award adequate to cover the loan balance

remaining thereafter. Pet. App. 13a. Maybe so. But the court's reading also conflicts with two other policies.

The first is that defendants should pay restitution only for losses they proximately cause. *United States* v. *West*, 646 F.3d 745, 751 (10th Cir. 2011) *cert. denied*, 80 USLW 3355 (U.S. Dec. 12, 2011) (No. 11-5863 (citing *Hughey*, 495 U.S. at 413)); *United States* v. *Squirrel*, 588 F.3d 207, 215 (4th Cir. 2009); see also 18 U.S.C. § 3663A(a)(2). The Seventh Circuit's view requires courts to reduce the restitution award only by the houses' values at resale, which means the defendant must pay for any decline in the houses' values between the time the lenders foreclose and the time the lenders resell. See *Smith*, 944 F.2d at 625. But the defendant's conduct is not the proximate cause for those declines, two other things are: First, the lenders' decision to keep the houses after foreclosure. *Id.* Second, events beyond the defendant's control—like the nationwide housing bust that occurred in the 31 months between the Inlet Shores property's foreclosure and resale. Thus, the Seventh Circuit's reading violates one of the statute's policies.

The decision below likewise violates the statute's policy against awarding windfalls to victims. See *United States* v. *Louper-Morris*, 672 F.3d 539, 566 (8th Cir. 2012); *United States* v. *Parker*, 553 F.3d 1309, 1323 (10th Cir. 2009). Again, under the Seventh Circuit's interpretation, a court may reduce the restitution award only by the value of the houses as of the time the lenders resell them. If the lender does not sell the houses before sentencing, then, the defendant must pay the full balance of the loans. Which means the lenders may then sell the houses later for a profit—a troubling incentive to abuse the

restitution process. The Seventh Circuit's answer is that district courts may later adjust restitution awards in those kinds of cases. Pet. App. 16a n.7. But nothing in the statute governing restitution procedure allows courts to do so. See 18 U.S.C. § 3664. That statute does allow courts to delay the restitution determination if a victim's loss is unclear. *Id.* § 3664(d)(5). A court may do so, however, only if it is careful to expressly reserve the question for a later date. *United States* v. *Pileggi*, 703 F.3d 675, 682–83 (4th Cir. 2013) (citing *Dolan* v. *United States*, 130 S. Ct. 2533 (2010)). In some cases, the lenders will therefore enjoy a windfall, and the Seventh Circuit is incorrect that its reading advances the statute's policies.

III. THIS CASE IS AN APPROPRIATE VEHICLE TO RESOLVE THE ISSUE

This case presents a suitable vehicle for resolving the split. The Seventh Circuit's decision squarely presents the question: Whether a defendant like Mr. Robers—who fraudulently obtained loans to buy houses and thus owes restitution for the loans—returns "any part" of the loans when he surrenders the houses to the lenders. Moreover, Mr. Robers preserved that question for appeal, notwithstanding the government's contrary argument below. He raised the issue at sentencing, Pet. App. 99a–100a., which is why the Seventh Circuit reviewed the question de novo. Pet. App. 8a. The Court should therefore take this opportunity to resolve this circuit split on a recurring issue of national importance.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

CHRISTOPHER DONOVAN
PRUHS & DONOVAN, S.C.
757 N. Broadway
Milwaukee, WI 53202

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SUPREME COURT
PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

JEFFREY T. GREEN *
JOSH C. HESS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

February 26, 2013

In the
United States Court of Appeals
For the Seventh Circuit

No. 10-3794

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENJAMIN ROBERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 10 CR 95—**Rudolph T. Randa**, *Judge*.

ARGUED SEPTEMBER 15, 2011—DECIDED SEPTEMBER 14, 2012

Before FLAUM, MANION, and SYKES, *Circuit Judges*.

MANION, *Circuit Judge*. Benjamin Robers pleaded guilty to conspiracy to commit wire fraud in violation of 18 U.S.C. § 371, based on his role as a straw buyer in a mortgage fraud scheme; Robers signed mortgage documents seeking loans which were based on false and inflated income and assets and based on his claim that he would reside in the houses as his primary residence and pay the mortgages. The loans went into default and the real estate which served as collateral for the loans were later foreclosed upon and resold.

For his role in the scheme, the district court sentenced Robers to three years' probation and ordered him to pay $218,952 in restitution to the victims—a mortgage lender of one property and the mortgage insurance company which had paid a claim on the other defaulted mortgage. Clearly, both mortgage holders experienced significant losses. Robers appeals, challenging only the restitution order.

The Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A "(MVRA"), governs federal criminal restitution. It provides, in the case of a crime "resulting in damage to or loss or destruction of property of a victim," that restitution is mandatory and that a court shall order a defendant to:

> (A) return the property to the owner of the property or someone designated by the owner; or
>
> (B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—
>
> > (i) the value of the property on the date of the damage, loss, or destruction, or
> >
> > (ii) the value of the property on the date of sentencing,
>
> less the value (as of the date the property is returned) of any part of the property that is returned.[1]

18 U.S.C. § 3663A(b)(1).

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[1] For simplicity's sake, we refer to the value of "the property that is returned" as the "offset value."

The dispute in this case concerns the calculation of the "offset value." Robers argues that the MVRA requires the court to determine the offset value based on the fair market value the real estate collateral had on the date the victim lenders obtained title to the houses following foreclosure because that is the "date the property is returned." The government counters that money was the property stolen in the mortgage fraud scheme and that foreclosure of the collateral real estate is not a return of the property stolen; rather, only when the collateral real estate is resold do the victims receive money (proceeds from the sale) which was the type of property stolen. Accordingly, the government argues that the offset value must be determined based on the eventual cash proceeds recouped following the sale of the collateral real estate.

This court in two non-precedential decisions has followed the government's approach. *See infra* at 16-18. The other circuits are split on the issue. The Second, Fifth and Ninth Circuits have held that in a mortgage fraud case, the offset value should be based on the fair market value of the real estate collateral at the time the victims obtain title to the houses. *See infra* at 18-19. Conversely, the Third, Eighth, and Tenth Circuits (and a dissent from the Ninth Circuit) have concluded that it is proper to determine the offset value based on the eventual amount recouped by the victim following sale of the collateral real estate. *See infra* at 19.

Today we join the view of the Third, Eighth, and Tenth Circuits—that the offset value is the eventual cash pro-

ceeds recouped following a foreclosure sale. We reach this decision based on the plain language of the MVRA. The MVRA states that the offset value is "the value (as of the date the property is returned) of any part of the property that is returned." 18 U.S.C. § 3663A(b)(1). "The property" for purposes of offset value must mean "the property stolen." The property originally stolen was cash. Some amount of cash is the only way part of the property can be returned. In the mortgage fraud case we have before us, the property stolen is cash—not the real estate which serves as collateral. Accordingly, the property stolen is only returned upon the resale of the collateral real estate and it is at that point that the offset value should be determined by the part of the cash recouped at the foreclosure sale.

We also agree with the government that the victims are entitled to expenses (other than attorney's fees and unspecified fees) related to the foreclosure and sale of the collateral property because those expenses were caused by Robers's fraud and reduced the amount of the property (cash) returned to the victim lenders. Because the district court included attorney's fees and unspecified fees in the restitution award, we vacate that portion of the district court's award, but otherwise affirm, and remand for proceedings consistent with this opinion.

I. Background

Benjamin Robers was a straw buyer in a mortgage fraud scheme devised by James Lytle and carried out by

Lytle and others. The scheme involved the submission of fraudulent loan applications which materially misrepresented the straw buyers' income, qualifications, and intent to live in the houses and repay the mortgages. The misrepresentations caused loan funds to be wired by lenders to settlement companies which closed the loans. The loans went into default and the banks later foreclosed on and then sold the houses which served as collateral for the loans.

The scheme involved more than fifteen houses in a small geographical area in Walworth County, Wisconsin. Robers served as a straw purchaser for only two houses—one on Grant Street in Lake Geneva and the other on Inlet Shores in Delavan. In the loan applications, which he signed, Robers falsely stated that he would use the houses as his primary residence and that he would pay the notes secured by the mortgages on the houses; he also provided false and inflated information concerning his income and assets. For his role in the scheme, Robers received a mere pittance—about $500 for each loan. Both loans went unpaid and the houses eventually went into foreclosure. After the government learned of the fraud, Robers waived indictment and pleaded guilty to an information charging him with one count of conspiracy to commit wire fraud.

After Robers pleaded guilty, the United States Probation Office prepared a Presentence Investigation Report ("PSR"). Of relevance to this appeal, the PSR recommended that Robers should be required to pay $218,952.18 in restitution, pursuant to the Mandatory

Victims Restitution Act of 1996, 18 U.S.C. § 3663A "(MVRA"). Robers objected to the $218,952.18 figure, arguing that his minor role in the offense and his limited economic circumstances should result in a total restitution obligation of $4,800. Robers also claimed that the proposed restitution award improperly held him responsible for the decline in real estate values and consequential and incidental expenses.

At sentencing, the government argued that neither Robers's limited role in the offense nor his limited resources justified a lower restitution amount, jointly and severally owed by all of the participants in the scheme. The government then presented testimony from two witnesses to establish the amount of restitution. First, Jim Farmer, a representative of Mortgage Guaranty Insurance Corporation ("MGIC"), testified that MGIC had insured the Grant Street mortgage (which was owned by Fannie Mae) and that Fannie Mae had submitted a claim for $159,214.91, which included unpaid principal, accrued interest, attorney's fees, property taxes, and other related expenses. Farmer explained that MGIC had the option of paying a percentage of the claim or paying the full amount of the loss and acquiring the real estate and then liquidating it. MGIC chose to do the latter and was able to reduce the amount of its loss to $52,952.18, which was lower than the amount it would have had to pay had it paid a percentage of Fannie Mae's claim. In mitigating its loss, though, MGIC incurred additional expenses, such as hazard insurance, yard maintenance, and the realtor's commission.

FBI Special Agent Michael Sheen also testified at the sentencing hearing. After detailing how the scheme operated, he explained that the Inlet Shores house had a mortgage note of $330,000 owned by American Portfolio and that the foreclosed real estate eventually sold for $164,000, resulting in a $166,000 loss. There were additional expenses related to the foreclosure sale, but American Portfolio had not responded to the government's request for additional information. Accordingly, the amount of restitution requested for the Inlet Shores mortgage was limited to $166,000.

The district court sentenced Robers to three years' probation—a below-Guideline sentence. Based on the testimony at the sentencing hearing, the district court ordered restitution of $166,000 to American Portfolio and $52,952.18 to MGIC, for a total restitution award of $218,952.18. Robers's co-conspirators who were involved with the procurement of the Grant Street and Inlet Shores mortgages were also ordered to pay restitution in the same amounts and the restitution awards were all entered with joint and several liability.[2] Robers appeals, challenging only the restitution award.

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[2] Restitution in the amount of $166,000 was ordered to American Portfolio, due jointly and severally with Jose Cortez Valadez, Case No. 07-CR-158 and John Boumenot, Case No. 09-CR-194. And restitution of $52,952.18 was ordered to MGIC jointly and severally with James Lytle, Case No. 07-CR-113, Bradley Hollister, Case No. 08-CR-229, and Eric Meinel, Case No. 09-CR-217.

II. Analysis

On appeal, Robers argues that the district court erred in calculating the amount of restitution based on the eventual resale value of the foreclosed real estate. Robers maintains that the district court should have based the restitution award instead on the fair market value of the real estate at the date of foreclosure, and that by using the eventual resale proceeds of the houses he was wrongly held responsible for the decline in their value. Robers also argues that many of the miscellaneous expenses included in the loss calculation for the Grant Street house are consequential or incidental damages that are not properly considered in a restitution award.[3] While generally we review a restitution order deferentially, reversing only for an abuse of discretion, both of Robers's arguments present questions of the award's legality. As such, our review is *de novo*. *United States v. Webber*, 536 F.3d 584, 601 (7th Cir. 2008) ("We review de novo questions of law regarding the federal courts' authority to order restitution; we review for abuse of discretion a district court's calculation of restitution, taking the evidence in the light most favorable to the Government.") (internal citations omitted). *See also United States v. Yeung*, 672 F.3d 594, 600 (9th Cir. 2012) ("We review the legality of a restitution order, including the district court's valuation method, de novo.").

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[3] Robers does not argue on appeal that his minor role in the offense and his limited economic circumstances should reduce the restitution amount.

A. Offset Value

1. The statutory language

The MVRA governs federal criminal restitution and provides, in relevant part, that a sentencing court "shall order" defendants convicted of certain crimes to "make restitution" to their victims.[4] 18 U.S.C. § 3663A(a)(1). In the case of a crime "resulting in damage to or loss or destruction of property of a victim," the statute further provides that the order of restitution shall require the defendant to:

> (A) return the property to the owner of the property or someone designated by the owner; or
>
> (B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—
>
> (i) the value of the property on the date of the damage, loss, or destruction, or
>
> (ii) the value of the property on the date of sentencing,
>
> less the value (as of the date the property is returned) of any part of the property that is returned.

18 U.S.C. § 3663A(b)(1).

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[4] Robers agreed that the ultimate victim of the Inlet Shores fraud was American Portfiolio and that MGIC was the ultimate victim of the Grant Street fraud.

Robers argues that the plain language of the MVRA required the district court to reduce the restitution award by the value of the mortgaged real estate as of the date of foreclosure because that is the value "as of the date the property is returned." He contends that it was legal error for the court to calculate the offsetting amount based on the eventual resale prices of the real estate because the houses were resold many months after the foreclosure actions gave title to the victim lenders.[3] And with the burst of the real estate bubble in the mid-2000s, Robers maintains that the houses sold for less, not based on his fraud, but for other unrelated reasons. The government responds that Robers's argument misreads the MVRA and argues that under the plain language of the MVRA, the restitution award is only reduced at the time that the mortgaged collateral is sold because cash is the property that was taken and cash is only returned at that point in time.

We agree with the government. More specifically, we hold that in calculating a restitution award where, as in this case, cash is the property taken, the restitution amount is reduced by the eventual cash proceeds recouped once any collateral securing the debt is sold.

We reach this holding based on the plain language of the MVRA. The MVRA states that the restitution award is reduced by "the value (as of the date *the property* is

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[3] The Inlet Shores house was sold 31 months after foreclosure but it is unclear from the record when the Grant Street real estate was sold.

returned) of any part of *the property* that is returned." 18 U.S.C. § 3663A(b)(1)(B)(ii) (emphasis added). Read in the context of the statute, "the property" must mean the property originally taken from the victim. The applicable subsection of the MVRA first addresses the situation we have here—where there is "damage to or loss or destruction of property of a victim of the offense." In this case the "loss" the victims suffered was a significant amount of cash. Next, it refers to the return of "the property to the owner." 18 U.S.C. § 3663A(b)(1). In this case, since the property taken from the victims was cash, the two houses purchased with the cash were not the property taken from the lenders, but rather were collateral that secured the cash loans. The two cannot be equated. Cash is liquid. Real estate is not. The victim-lender was defrauded out of cash and wants cash back; the victim does not want the houses and they do not, in any way, benefit from possessing title to the houses until they are converted into cash upon resale. Under the plain language of the statute, what matters is when at least part of the cash was returned to the victims—not when the victims received title to the houses securing the loans. And the cash was returned to the victims only when the collateral houses securing the loans were eventually resold.

Our interpretation of the MVRA gives the phrase "the property" a consistent meaning throughout the statute: It always means "the property stolen." Robers's interpretation, on the other hand, seeks to give the phrase "the property" a different meaning within the same statutory section. Under Robers's interpretation

the property returned would be the collateral houses and their estimated value at the time the victim receives title. However, "[t]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Matter of Merchants Grain, Inc. By and Through Mahern*, 93 F.3d 1347, 1356 (7th Cir. 1996) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). The MVRA directs the court to offset the loss by "the value (as of the date the property is returned) of any part of the property that is returned." Under Robers's interpretation "any part" of the property returned would have to refer to the collateral house. Obviously part of a house cannot be returned. Nor can a house (or any part of a house) be the same as cash. It is only when "the property" means "the property stolen" (cash) that the *"any part"* language makes sense, because then it is possible to return only a part of the property. A house is not part of the cash. Thus, our reading both gives the phrase "the property" a consistent meaning throughout the MVRA and does not render the *"any part"* language of the statute superfluous or nonsensical.

2. The MVRA's statutory goal

The MVRA's overriding purpose is "to compensate victims for their losses." *United States v. Pescatore*, 637 F.3d 128, 138 (2d Cir. 2011) (internal quotations omitted). And

> [b]ecause the MVRA mandates that restitution be ordered to crime victims for the "full amount" of

> losses caused by a defendant's criminal conduct, *see* 18 U.S.C. § 3664(f)(1)(A); *United States v. Reifler*, 446 F.3d at 134 . . . , it can fairly be said that the "primary and overarching" purpose of the MVRA "is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being."

United States v. Boccagna, 450 F.3d 107, 115 (2d Cir. 2006) (quoting *United States v. Simmonds*, 235 F.3d 826, 831 (3d Cir. 2000).

Our holding is consistent with the goals of the MVRA, as well as the concept of restitution. The offset amount for purposes of restitution is the cash recouped following the disposition of the collateral. Otherwise the victims would not be made whole again because the eventual sales proceeds could be, as they were in this case, woefully inadequate to fully compensate the victims for their loss and to put them in the position they would have been absent the fraud.

Robers claims otherwise, asserting that our reading of the MVRA makes him the insurer of real estate values and improperly holds him responsible for declines in the real estate market. Robers then posits that the victims' losses in this case were caused by the collapse of the real estate market and not his fraud. Therefore holding him responsible for the further decline in the real estate values—after the victims acquired title to the houses—violates the underlying purpose of the MVRA.

Not so. Contrary to Robers's argument, his fraud actually caused the losses at issue here. Absent his fraudu-

lent loan applications, the victim lenders would not have loaned the money in the first place. Likewise the mortgage notes would not have been extended, not paid, and then defaulted upon. And the banks would not have had to foreclose on and then resell the real estate in a declining market at a greatly reduced value.

The decline in the real estate market does not mitigate his fraud. Robers lied about several things—his intent to reside in the house as his primary residence, his promise to pay the mortgage, his inflated income, and his exaggerated asset value. Absent Robers's fraud, the decline in the real estate market would have been irrelevant: Assuming he actually qualified for the loans, he would be living in the house and making the mortgage payments out of the income he claimed to be earning. If his assets had the value he claimed, he would not want to risk using them to satisfy any deficiency following a foreclosure sale. The declining market only became an issue because of Robers's fraud. *See Yeung*, 672 F.3d at 603 n.5 ("[H]ere Yeung created the circumstances under which the harm or loss occurred through her use of false information that induced the Long Beach Trust to purchase the loan. Because the Long Beach Trust's loss is directly related to Yeung's offense, the declining value of the real estate collateral, even if attributable to general financial conditions, does not disrupt the causal chain, and the victims of the fraud are entitled to restitu-

tion.") (internal citation omitted).[6] Essentially Robers wants a bailout, leaving the victims of his fraud to suffer the consequences of his deceit. Robers, not his victims, should bear the risk of market forces beyond his control. *See United States v. Rhodes*, 330 F.3d 949, 954 (7th Cir. 2003) ("[The defendant], rather than the victims, should bear the risk of forces beyond his control." (quoting district court opinion)).

If the real estate values increased, thereby allowing the creditor to resell the houses at a higher amount than owed, the bank would not be entitled to a restitution award. Similarly, if the increased sales price merely reduced the bank's loss, it would obviously be error for the district court to order restitution based on the earlier lower market value because "[t]he VWPA and MVRA ensure that victims recover the full amount of their losses, but nothing more." *United States v. Newman*, 144 F.3d 531, 542 (7th Cir. 1998). *See also United States v. Smith*, 156 F.3d 1046, 1057 (10th Cir. 1998) ("[A] district court may not order restitution in an amount that exceeds the loss caused by the defendant's conduct. Such a restitution order would amount to an illegal sentence. [T]he imposition of an illegal sentence constitutes plain error.") (internal quotations omitted). Thus, what Robers truly seeks is a one-way ratchet. But "the 'intended beneficiaries' of the MVRA's procedural mechanisms 'are the

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[6] Contrary to our holding, *Yeung* held that the offset value for purposes of restitution is the collateral's value at the time title transfers to the loan holder. *See infra* at 25-28.

victims, not the victimizers.'" *United States v. Moreland*, 622 F.3d 1147, 1172 (9th Cir. 2010) (quoting *United States v. Grimes*, 173 F.3d 634, 639 (7th Cir. 1999)).[7]

3. Seventh Circuit precedent

Our holding is consistent with this circuit's previous decisions reached in non-precedential orders. In *United States v. Cage*, 365 Fed. App'x 684, 687 (7th Cir. 2010), this court stated:

> The restitution amount proposed by the government and adopted by the court at sentencing was the amount in mortgage loans that Cage helped to fraudulently secure less the amount the lenders recovered through the sale of the fraudulently purchased properties. This was a proper way to calculate the amount of restitution [] owed . . . .

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[7] If a district court had entered a restitution order based on the estimated fair market value of the real estate prior to resale and the eventual sales proceeds ended up higher, a defendant could come back to court and request that the restitution award be reduced. Rather than speculate and then later adjust the restitution award, we believe the better approach is to do what, according to the government, the Eastern District of Wisconsin does: If the collateral real estate has not been sold by the time of sentencing, the court enters a restitution award for the total loss to the victims and once the real estate is sold, the court modifies the restitution award based on the cash proceeds.

And in *United States v. Bates*, 134 Fed. App'x 955 (7th Cir. 2005), we explained the difference between the property stolen (cash) and the property returned (real estate collateral) stating:

> Bates insists that Coldwell did not suffer any compensable loss because it ended up with the residence, and that the "loss" claimed by the realtor in fact consists of unrecoverable "incidental and consequential damages" and "lost profits." Bates, though, did not take a house from Coldwell; she caused the realtor to lose cash, but cash is not what was "returned" to Coldwell. Coldwell assumed temporary ownership of the residence only as a means of mitigating Bates's fraud, and so long as Coldwell possessed a residence it did not want instead of the funds Bates caused it to expend, the realtor was not made whole—Bates's fraud placed Coldwell in the position of real estate seller rather than realtor.

Id. at 958.

These Seventh Circuit decisions, though, as noted, are non-precedential.[8] The other circuits are split on the

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[8] In *United States v. Shepard*, 269 F.3d 884, 888 (7th Cir. 2001), this court also considered the question of the appropriate amount of offset, but *Shepard* is distinguishable from the case at hand. In *Shepard*, the defendant argued that "he and his wife 'returned' about $12,000 of the [stolen] $92,000 by using it to make improvements in [the victim's] home." *Id.* at 887. We noted that "to the extent improvements increased the

(continued...)

appropriate offset amount to use in calculating restitution.[9] In a series of cases, the Ninth Circuit has held

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[8] (...continued)
market value of [the victim's] house, and thus were (or could have been) realized by [the victim's] estate in selling the property, the funds were 'returned' for statutory purposes." *Id.* We continued: "It is no different in principle from taking the money from one of [the victim's] bank accounts and depositing it in another a week later. So long as [the victim] regained beneficial use of the property, it has been 'returned' as § 3663A(b)(1)(B)(ii) uses that term." *Id.* at 887-88. In *Shepard*, though, the government did not contend that the "the change of the property's form—from cash to, say, central air conditioning—precludes a conclusion that the property has been 'returned.'" *Id.* at 888. Moreover, in *Shepard*, the victim was using and benefitting from the home improvements, whereas in this case, the victims were not using the collateral, but were merely attempting to sell the collateral to recoup their stolen property—cash. Finally, while *Shepard* remanded the case for determination of "the amount by which improvements enhanced the market value of the house," there was no discussion concerning the appropriate time for this valuation, i.e., upon resale of the house or at the time the home improvements were made. *Id.* Thus, *Shepard* does not answer the question before us.

[9] The following cases interpret both the MVRA and its predecessor, the Victim and Witness Protection Act of 1982 ("VWPA"). Unlike the MVRA, the VWPA required courts to consider the economic circumstances of the defendant prior to ordering restitution, and the granting of restitution was discretionary, not mandatory. *See* 18 U.S.C. § 3663. "With (continued...)

that the offset amount is the fair market value of the collateral real estate at the date of foreclosure when the victim-lender took title and could have sold it for cash. *See United States v. Smith*, 944 F.2d 618, 625-26 (9th Cir. 1991); *United States v. Hutchison*, 22 F.3d 846, 856 (9th Cir. 1993); *United States v. Catherine*, 55 F.3d 1462, 1465 (9th Cir. 1995); *United States v. Davoudi*, 172 F.3d 1130, 1135 (9th Cir. 1999); *United States v. Gossi*, 608 F.3d 574, 578 (9th Cir. 2010); *United States v. Yeung*, 672 F.3d 594, 605 (9th Cir. 2012). The Second and Fifth Circuits have similarly held that in a mortgage fraud case, the restitution offset is based on the fair market value of the collateral at the time it is returned to the victim. *See United States v. Boccagna*, 450 F.3d 107, 120 (2d Cir. 2006); *United States v. Holley*, 23 F.3d 902, 915 (5th Cir. 1994). Conversely, the Third, Eighth, and Tenth Circuits have held that it is proper to base the offset value on the eventual amount recouped by the victim following sale of the collateral real estate. *See United States v. Himler*, 355 F.3d 735, 745 (3d Cir. 2004); *United States v. Statman*, 604 F.3d 529, 538 (8th Cir. 2010); *United States v. James*, 564 F.3d 1237, 1246-47 (10th Cir. 2009).

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[9] (...continued)
these exceptions, the two statutes are identical in all important respects, and courts interpreting the MVRA may look to and rely on cases interpreting the VWPA as precedent." *See United States v. Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004).

4. Circuits holding that the offset value is determined based on the estimated fair market value of the collateral securing the loans at the date of foreclosure when title is transferred to the lender

Our conclusion conflicts with the view of the Ninth, Fifth, and Second Circuits. As noted above, those courts all held that the offset amount is the estimated fair market value of the collateral at the date of foreclosure. In reaching this conclusion, the courts all purported to rely on the plain language of the MVRA, stressing that under the MVRA, courts are to reduce the restitution award by "the value (as of the date *the property* is returned)." But none of those cases actually addressed the question of what constitutes "the property" under the statute. And their conclusions are based on the courts improperly treating the collateral recovered as the property stolen.

a. The Ninth Circuit

Examining the development of the case law in the Ninth Circuit illuminates this omission. *Smith* was the first of the cases to consider the appropriate offset in a similar situation—where the victim lent cash based on the defendant's fraud and eventually foreclosed on the real estate securing the loan. *Smith*, 944 F.2d at 620-21. In *Smith*, the defendant asserted "that the district court failed to give him adequate credit against the restitution amount for the value of the collateral property," arguing that the court should have used the value of the

real estate at the time the victims regained title to the property. *Id.* at 625. Smith alleged "that because the value of Texas real estate steadily declined throughout the time in question, the measurement of the property's value at the later dates resulted in an inadequate credit for the collateral property, and that therefore the restitution figure is far too high." *Id.* The Ninth Circuit agreed with defendant Smith. And *Smith* serves as the linchpin for further cases. Because the court went astray in *Smith* by applying language in the much different property restitution case (*Tyler*), we quote its reasoning in full:

> We agree with Smith that the district court used incorrect dates in valuing the property. The Act provides that if a victim has suffered a loss of property, the district court may order restitution in the amount of this loss "less the value (*as of the date the property is returned*) of any part of the property that is returned." 18 U.S.C. § 3663A(b)(1) (emphasis added). We interpreted this portion of the Act in *United States v. Tyler*, 767 F.2d 1350 (9th Cir. 1985) (*Tyler*), in which Tyler pled guilty to theft of timber and was ordered to pay restitution under the Act. The district court determined the amount of restitution as the difference between the value of the timber at the time of sentencing and the higher value at the time of theft. *Id.* at 1351. Because the government recovered the timber on the day of the theft, however, we concluded that "[a]ny reduction in its value stems from the government's decision to hold the timber during a period of declining prices, not

from Tyler's criminal acts." *Id.* at 1352. The value of the property "'as of the date the property [was] returned'" equaled the amount lost when the timber was stolen, and therefore restitution under the Act was inappropriate. *Id.* (quoting 18 U.S.C. § 3579, which was subsequently renumbered as 18 U.S.C. § 3663).

The same reasoning should apply in determining the value of the collateral property in this case. Smith should receive credit against the restitution amount for the value of the collateral property as of the date title to the property was transferred to either Savings & Loan or Gibraltar. As of that date, the new owner had the power to dispose of the property and receive compensation. *Cf.* 18 U.S.C. § 3663(e)(1) (restitution may be ordered for any person who has compensated a victim). Value should therefore be measured by what the financial institution would have received in a sale as of that date. Any reduction in value after Smith lost title to the property stems from a decision by the new owners to hold on to the property; to make Smith pay restitution for that business loss is improper. *See Tyler*, 767 F.2d at 1352. The victims in this case "receive[d] compensation" when they received title to the property and the corresponding ability to sell it for cash; the value of the compensation should therefore be measured and deducted from the total loss figure as of the date title was transferred. 18 U.S.C. § 3663(e)(1). Because the law is clear, to do otherwise would be an abuse of discretion.

Id. at 625-26.

There are several flaws in *Smith*'s reasoning. First, *Smith* quoted, with emphasis, the "less the value (as of the date the property is returned)" language from the MVRA, but ignored the fact that the property returned was not the property stolen. *See Smith*, 944 F.2d at 631-32 (O'Scannlain, J., dissenting) (explaining that the majority "erroneously treats the five collateral properties as if they are somehow equivalent to the stolen capital," but "[w]hat Smith stole was capital, and to restore his victims to the status quo ante, he must return the present value of that capital."). Second, and relatedly, the Ninth Circuit in *Smith* relied heavily on its decision in *Tyler* to support its reasoning, but *Smith*'s reliance on *Tyler* was misplaced because in *Tyler*, the defendant was charged with theft of government timber and the exact same property (i.e., the timber) was recovered on the very day of the theft. Thus, *Tyler* does not support the view that "the property" in the MVRA means any property returned, as opposed to the property stolen. *See Smith*, 944 F.2d at 632 (O'Scannlain, J., dissenting) ("Nor does our decision in *United States v. Tyler*, 767 F.2d 1350 (9th Cir. 1985), upon which both the majority and Smith rely, support the court's holding. *See ante* at 624-25. A defrauded lender's assumption of title over collateral property that is itself part of the fraud is in no way analogous to a timber owner's recovery of stolen timber.") Third, *Smith* reasoned that as of the date the victim received title to the collateral, the new owner had the power to dispose of the real estate and receive compensation, and accordingly the value of the real estate should be based on the amount

the financial institution would have received in a sale as of that date. This reasoning ignores the reality that real property is not liquid and, absent a huge price discount, cannot be sold immediately. Fourth and finally, the court in *Smith* unreasonably assumed that any reduction "after Smith lost title to the property stems from a decision by the new owners to hold on to the property." *Smith*, 944 F.2d at 625. This rationale also incorrectly assumes that real estate is liquid—which it is not.

We say all of this because the Ninth Circuit's decision in *Smith* served as the keystone for all of the subsequent decisions holding that the offset value is the fair market value of the collateral real estate on the date the title to the collateral reverted to the victim. For instance, in *United States v. Hutchinson*, 22 F.3d 846 (9th Cir. 1993), the defendant challenged the district court's use of the final sales price as the offset value. Based on *Smith*, the Ninth Circuit agreed that the appropriate offset was the value of the collateral at the time the bank gained control of the real estate. Similarly, in *United States v. Catherine*, 55 F.3d 1462 (9th Cir. 1995), the defendant argued that the district court should have valued the real estate for offset purposes at the time the victim foreclosed on the collateral real estate, and the Ninth Circuit stated: "We decided this exact issue in *Hutchinson*, *id.* at 854-56, which in turn, relied on *United States v. Smith*." *Id.* at 1465. The court in *Catherine* then followed these precedents and reversed and remanded the case for the district court to value the collateral at the time the bank received title. *Id.* And in *United States v. Davoudi*, 172 F.3d 1130 (9th Cir. 1999),

the Ninth Circuit again held that the district court erred in basing its offset valuation on the eventual sales price of the collateral. *Davoudi* parroted *Smith*'s reasoning and cited *Smith*, *Catherine*, and *Hutchinson*. Then in *United States v. Gossi*, 608 F.3d 574 (9th Cir. 2010), the Ninth Circuit relied on *Davoudi*, to conclude: "Under this Court's precedent, the district court reasonably found that [the victim] had the power to dispose of the property at the time it took control of the property at foreclosure. 'Value should therefore be measured by what the financial institution would have received in a sale as of that date.'" *Id.* at 578 (quoting *Smith*, 944 F.2d at 625).

The final and most recent decision from the Ninth Circuit is *United States v. Yeung*, 672 F.3d 594 (9th Cir. 2012). In *Yeung*, the court considered the propriety of several restitution orders to financial institutions which suffered losses following a fraudulent real estate scheme and stated:

> Using the framework set forth in § 3663A(b), we have developed some guidelines for calculating the restitution amount in a case involving a defendant's fraudulent scheme to obtain secured real estate loans from lenders. Generally, district courts calculating a direct lender's loss in this context begin by determining the amount of the unpaid principal balance due on the fraudulent loan, less the value of the real property collateral as of the date the direct lender took control of the property. *United States v. Hutchison*, 22 F.3d 846, 856 (9th Cir. 1993); *United States v. Smith*, 944 F.2d 618, 625-26 (9th Cir. 1991)

> (construing the VWPA). Because restitution should address a victim's "actual losses," *see Smith*, 944 F.2d at 626, we have approved restitution awards that included other amounts in the calculation of loss, such as prejudgment interest (using the governmental loan rate), *id.*, interest still due on the loan, *Davoudi*, 172 F.3d at 1136, and expenses associated with holding the real estate collateral that were incurred by the lender before it took title to the property, *Hutchison*, 22 F.3d at 856. To calculate the value of the real property collateral "as of the date the property is returned," § 3663A(b)(1)(B)(ii), courts use the value of the collateral "as of the date the victim took control of the property," *Davoudi*, 172 F.3d at 1134. The lender does not take control of the collateral merely by triggering the foreclosure process. *See United States v. Gossi*, 608 F.3d 574, 578 (9th Cir. 2010). Rather, the lender generally takes control on the date the lender either (1) receives the net proceeds from the sale of the collateral to a third party at the foreclosure sale, *see United States v. James*, 564 F.3d 1237, 1246 (10th Cir. 2009), or (2) takes title to the real estate collateral at the foreclosure sale, at which time "the new owner had the power to dispose of the property and receive compensation," *see Smith*, 944 F.2d at 625. The direct lender's losses may also be reduced by amounts recouped from resale of the loan or from other types of "return" of property. *See, e.g., Hutchison*, 22 F.3d at 856.

Id. at 601.

On the basis of this precedent, the Ninth Circuit in *Yeung* then reversed the district court's restitution awards, which were based on the subsequent sales price of the real estate, and remanded to the district court.[10]

As the above excerpt from *Yeung* makes clear, its holding was based on the well-established precedent that flowed from *Smith*. And as discussed above, none of those cases addressed the fundamental distinction between the property stolen (cash) and the property recovered (real estate). Like its predecessors, *Yeung* did not recognize that the *Smith* decision relied on *Tyler*, which was factually distinguishable from all of the

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[10] *Yeung* also held that "when a victim purchased a loan in the secondary market, that is, where the victim is the loan purchaser as opposed to the loan originator . . . the value of that loan is not necessarily its unpaid principal balance, but may vary with the value of the collateral, the credit rating of the borrower, market conditions, or other factors, [and thus] the loan purchaser may have purchased the loan for less than its unpaid principal balance." *Yeung*, 672 F.3d at 601-02. The Ninth Circuit in *Yeung* then remanded the case to the district court to recalculate the restitution award. Robers filed *Yeung* as supplemental authority and argued that, as in *Yeung*, remand is required to determine the price at which the loans were purchased in the secondary market. Robers, however, had never previously argued (either before the district court or in briefing or at oral argument) that the restitution award was improperly based on the outstanding principal balance, as opposed to some potentially lower amount paid for the loans in the secondary market. Therefore, he has waived these issues.

cases at hand because *Tyler* involved a case where the property the defendant was charged with stealing was the same as the property returned to the victim (timber) and the theft and return happened on the same day.

b. The Fifth Circuit

The *Smith* decision has likewise served as the basis for other circuits holding that the offset value is the value of the collateral at the time of foreclosure. In *United States v. Holley*, 23 F.3d 902, 915 (5th Cir. 1994), the Fifth Circuit, like the Ninth Circuit, held that the offset value should be based on the fair market value on the date of foreclosure. In coming to this conclusion, the Fifth Circuit first stated that its decision in *United States v. Reese*, 998 F.2d 1275 (5th Cir. 1993), dictated the result. It noted that in *Reese* it had

> explained that "it would appear that the 'property' as to which [the savings and loan] might have suffered 'damage to or loss or destruction of' could only be loan proceeds funded in cash at the original closing of [the improperly extended] loan." *Id.* at 1283. However, we also explained that when the real property that secures such a loan is deeded back to the financial institution, "the value of such property should constitute a partial return of the 'cash loan proceeds.'" *Id.* at 1284.

Holley, 23 F.3d at 915.

But the court's reasoning in *Reese* was limited to this statement: "Conceptually, it would seem to us that

when a lender accepts conveyance of the secured property in lieu of foreclosure, the value of such property should constitute a partial return of the 'cash loan proceeds.'" *Reese*, 998 F.2d at 1284. This reasoning ignores the fact that the victim accepted the collateral real estate, not in lieu of the cash proceeds, but in order to sell and recoup the cash proceeds.

After citing the reasoning of *Reese*, the court in *Holley* then turned to *Smith*, stating:

> The *Smith* court held that the defendant "should receive credit against the restitution amount for the value of the collateral property as of the date title to the property was transferred" to the FSLIC's successor. *Id.* at 625. The court reasoned that, as of that date, "the new owner had the power to dispose of the property and receive compensation." *Id.* The *Smith* court concluded that the value of the returned property "should therefore be measured by what the financial institution would have received in a sale as of that date. Any reduction in value after [the defendant] lost title to the property stems from a decision by the new owners to hold on to the property." *Id.*

Holley, 23 F.3d at 915.

Unlike the Ninth Circuit's decision in *Smith*, the Fifth Circuit in *Holley* at least acknowledged the government's argument "that the 'property' that was lost was [the bank's] capital and that the return of [the real estate] to [the bank] represents only the return of the collateral for the

actual property involved in this case" and that it was not until that collateral was sold for cash that the victim regained its property. *Id.* But *Holley* did not provide any basis for ignoring this distinction, other than citing its previous decision in *Reese*. *See id.* And *Reese* merely concluded that there was no "conceptual" difference. *Reese*, 998 F.2d at 1284. However, as explained above, the two are not conceptually equivalent: cash is liquid, real estate is not; the collateral secured the cash loan—it was not the cash loan; and the victim had cash before the fraud and wanted cash back as its returned property. In short, we find the Fifth Circuit's reasoning in *Reese* unpersuasive and thus its decision in *Holley* adds nothing to the analysis.

c. The Second Circuit

Finally, the Second Circuit addressed the issue of offset value in *United States v. Boccagna*, 450 F.3d 107 (2d Cir. 2006). In *Boccagna*, the defendants were charged in a mortgage fraud scheme involving the United States Department of Housing and Urban Development ("HUD"). *Id.* at 109-110. HUD foreclosed on the collateral and then resold the real estate at a fraction of their fair market value to the New York City Department of Housing Preservation and Development in order to further its mission to develop low-cost housing. *Id.* at 110. When considering the appropriate amount by which to offset the victim's loss, the *Boccagna* court initially noted that the government did not argue that "the property that is returned" language of the MVRA only applies to actual

cash and not to "any property that HUD obtained after default." *Id.* at 112 n.2. The court then said that "[s]uch an argument would not be convincing," but based its holding on precedent from the Fifth and Ninth Circuits.[11] *Id.* *Boccagna* explained:

> As two of our sister circuits, construing identical offset language in the Victim and Witness Protection Act, codified at 18 U.S.C. § 3663, have concluded, when a lender victim acquires title to property securing a loan, "the value of such property should constitute a partial return of the cash loan proceeds." *United States v. Holley*, 23 F.3d 902, 915 (5th Cir. 1994) (internal quotation marks omitted); *see United States v. Smith*, 944 F.2d 618, 625 (9th Cir. 1991) (holding that defendant "should receive credit against the restitution amount for the value of the collateral property as of the date title to the property was transferred" to lender victim).

Boccagna, 450 F.3d at 112 n.2.

The Second Circuit in *Boccagna* then went on to hold that the offset value should generally be based on the fair market value of the real estate at the time of foreclosure. *Id.* at 109. *Boccagna*, thus, adds nothing to the analysis, having merely relied on *Holley* and *Smith*—which were incorrect for the reasons noted above.

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[11] The court in *Boccagna* also cited this court's decision in *Shepard*. But as discussed above, *see supra* at 17-18 n.8, *Shepard* is distinguishable.

In sum, as our detailed discussion of the Ninth, Fifth and Second Circuits' decisions explains, those decisions all relied on the keystone decision in *Smith*. And the Ninth Circuit's reasoning in *Smith* is flawed for several reasons: *Smith* purported to rely upon the statutory language but ignored the distinction between the property stolen (cash) and the property returned (real estate). Compounding this error was *Smith*'s reliance on *Tyler* which was factually distinct. In *Tyler*, the defendant was charged with stealing timber and the property recovered—on the same day as the theft—was timber. Thus, *Tyler* does not answer the question of the appropriate offset value where the property stolen and returned differ. The Ninth Circuit in *Smith* also treated real estate as a liquid asset. But it was not liquid because the collateral could not be turned into cash the same day title transferred. The court misconstrued the market forces by assuming that the only reason collateral would not be immediately turned into cash would be a deliberate decision by the victim to hold on to the property. Beyond *Smith*'s faulty reasoning, the only additional rationale for using the value of real estate at the time the victim obtained title to the collateral was the Fifth Circuit's view in *Reese* that, conceptually, obtaining title to real estate is the same as receiving cash. But it is not: real estate is not liquid; it is not what was stolen; it is not what the victim wants; and it does not benefit the victim in any way until it is turned back into cash upon resale. Accordingly, it is only when the real estate is converted into cash through a future sale that the offset value should be determined. The plain language of the

MVRA dictates this conclusion because "the value (as of the date *the property* is returned)," 18 U.S.C. § 3663(b) (emphasis added), in the context of the statute must mean the property taken from the victim. But even if there were any ambiguity in the meaning of "the property," we would interpret that language to best achieve the statutory goal of the MVRA—to make the victim whole—and this goal is best achieved by calculating restitution based on the actual cash proceeds recouped following the resale of any collateral real estate.

5. Circuits holding that the offset value is determined based on the cash proceeds recouped following resale of the collateral real estate.

This brings us now to the decisions from the Third, Eighth and Tenth Circuits, which have all held that their respective district courts correctly used, as the offset value for calculating restitution, the eventual proceeds recouped following a foreclosure sale.[12]

a. The Third Circuit

The Third Circuit addressed this issue in *United States v. Himler*, 355 F.3d 735 (3d Cir. 2004). In *Himler*, the defen-

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[12] As discussed earlier, *see supra* at 23, Judge O'Scannlain dissented in the pivotal Ninth Circuit opinion (*United States v. Smith*), preferring the same approach to the offset valuation later approved by the Third, Eighth, and Tenth Circuits.

dant had fraudulently purchased a condominium by tendering false checks to a settlement company that in turn paid the seller $193,833. *Id.* at 737. The district court ordered Himler "to pay restitution in the amount of $193,833—to be reduced by the ultimate net proceeds from the sale of the condominium." *Id.* at 744. The Third Circuit upheld that award, noting first that the victim in this case "was not a seller of the condominium who was returned to his or her pre-crime position upon reobtaining title to the condominium. Rather, [the victim] was the settlement company that facilitated the purchase and sale between [the seller] and [the defendant]." *Id.* And deeding the collateral real estate back to the settlement company did not adequately compensate the victim for its loss.[13] *Id.* at 744-45. The Third Circuit then noted that the government had conceded that the statute requires a district court to "value" the property "as of the date the property is returned" to the victim. *Id.* at 745. But the court agreed with the government that the district court did not abuse its discretion in entering a restitution order that would be reduced by the future proceeds from the real estate's sale. *Id.* In reaching this conclusion, the court noted that, had the offset amount been determined prior to its sale, the defendant would have been left with a high bill because market forces

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[13] In *Himler*, the court also noted that the defendant had purchased the condominium at an inflated price ($193,833) while other similar condominiums were selling between $150,000 and $160,000. *Himler*, 355 F.3d at 744.

allowed the condominium to sell for $181,000, whereas at the time title transferred to the settlement company, similar condominiums were selling for $150,000 to $160,000. *Id.*

In *Himler*, the Third Circuit seemed to rely on the fact that the defendant was in a better position under the district court's approach because the real estate values had increased between the time title transferred and the resale. *Id.* at 745. Obviously, we have the converse here, but what *Himler*'s reasoning illustrates is that with fluctuating real estate values, the only way to measure the true loss to the victim is by looking to the actual resale price of the collateral real estate. Under the MVRA, the actual loss is the appropriate measure of restitution.

b. The Tenth Circuit

In *United States v. James*, 564 F.3d 1237 (10th Cir. 2009), the Tenth Circuit also upheld a restitution award that calculated the total loss by subtracting the eventual resale price of the collateral real estate from the initial loan proceeds. *Id.* at 1246-47. In *James*, the Tenth Circuit reasoned that "[b]ecause, in this case, the foreclosure price method more closely reflects the actual loss [the victim] experienced, we cannot say the district court's method of using that value was unreasonable or that it otherwise erred in using that valuation method in determining the amount of restitution under the MVRA." *Id.*

c. The Eighth Circuit

Similarly, in *United States v. Statman*, 604 F.3d 529 (8th Cir. 2010), the Eighth Circuit upheld the district court's use of the eventual proceeds from a foreclosure sale as the offset value. *Id.* at 538. In that case, the defendants had been charged with wire fraud in relation to a scheme to purchase a business. *Id.* at 532. Among other things, in purchasing the business they assumed a bond secured by real estate. *Id.* at 536. Following their conviction for fraud, at sentencing defendant Rund objected to the government's methodology for calculating restitution. *Id.* at 537. Then on appeal Rund argued that "the district court erred because the loss to [the victim] should not have been calculated based on the alleged foreclosure sale price but [, instead, on] the assessed value of the properties." *Id.* The court rejected Rund's approach, which, as the Eighth Circuit explained, "would have this court use the appraised value of the foreclosed property to calculate the loss amount, which would result in a lower restitution payment to [the victim]." *Id.* In rejecting Rund's approach, the Eighth Circuit stressed the overarching goal of the MVRA—making crime victims whole—and then concluded that "[u]nder the circumstances of this case, the district court's use of the foreclosure sale price provided a fair and adequate representation of [the victim's] loss and satisfied the overarching goal of the MVRA, to make [the victim] whole." *Id.*

The *Himler*, 355 F.3d 735, *Statman*, 604 F.3d 529, and *James*, 564 F.3d 1237, decisions all support our conclusion

today that the offset value is best determined by the money eventually recouped upon the resale of the collateral real estate. This conclusion is consistent with the plain meaning of the MVRA and also furthers the statutory goal of making the victims whole again. Accordingly, today we join the view of the Third, Eighth, and Tenth Circuits and hold that the offset value is the eventual proceeds recouped following a foreclosure sale.

B. Inclusion of Other Expenditures

In addition to challenging the district court's use of the eventual resale price of the foreclosed real estate as the offset value, Robers also argues on appeal that the district court erred in including various other expenditures in the restitution award related to the Grant Street real estate. The Inlet Shores restitution award was based solely on the difference between loan amount and the resale amount, so there is no additional issue there. But with the Grant Street real estate, the restitution awarded was based on the following figures:

Claim:	
Unpaid Principal balance	$140,478.91
Accrued interest	$ 13,698.36
Attorney fees	$ 1,400.00
Property taxes	$2,478.10
Other expenses	$450.00
Hazard Insurance	$485.00
Property preservation	$736.54
Statutory Disbursement	$1,311.56
Less ending escrow balance	($1,823.56)
Total Claim paid:	**$159,214.91**

Additional expenses after MGIC took over ownership:	
Insurance	$374.51
Utilities	$112.69
Title Commitment	$325.00
Broker price opinion	$119.00
Claim investigation costs	$715.00
Total Expenses:	**$1,646.20**

Recovery from sale:	
Sales Price	$118,000.00
Broker's commission	($8,080.00)
Prorated taxes	($1,724.68)
Title Policy	($607.00)
Settlement charges	($679.39)
Net Proceeds	**$107,908.93**
Total Loss	**$52,952.18**

In challenging these line-item expenses, Robers merely argues that the district court did not adequately explain how or why they should be included. And then he stresses that consequential and incidental expenses are not recoverable. The only specific line-item expenses, though, for which he develops an argument are "attorney's fees" and "other expenses." This court has held that attorney's fees expended in pursuing litigation are not recoverable, *Shepard*, 269 F.3d at 887, but they are recoverable if they represent damage to the property or are incurred as part of an investigation for the prosecution. *Scott*, 405 F.3d at 620. Because we lack sufficient detail to know on which line these attorney's fees fall, we vacate that portion of the restitution award. Similarly, because we cannot know what "other expenses" means and thus whether they are recoverable, we vacate that portion of the restitution award as well.

We reject, however, Robers's claim that the district court did not adequately explain why it included the other miscellaneous expenditures in the restitution award. After stating that it had read the parties' restitution memoranda and the defense's objections, the district court explained:

> The trend is, I think—and the thrust of Seventh Circuit case law, and the thread that runs is becoming stronger in this fabric, is that these expenses aren't going to be considered as consequential . . . . As the government has argued, these are fraud cases. It was a fraud that was perpetrated, which resulted in all of these actions that had to be taken but for

> the fraud. And that's not putting a person, a victim in this type of case, in a better place. It's putting a victim back where the victim never should have gone and never would have been but for the conduct that was conducted by the defendant. . . . And I deem it to be the case in this case, as I deemed it to be in the Bradley Hollister case. . . . so consistent with the logic of it, I think that the logic is overwhelming, that the fraud was committed. The victim is owed, and he's owed the direct expenses—I'll call them direct expenses that flow from the fraud that would not have existed or not there—never would have been there.

Robers believes that this discussion is insufficient, citing *United States* v. *Hosking*, 567 F.3d 329 (7th Cir. 2009), wherein the government presented only a single document with general and vague descriptions of the victim's costs. *Id.* at 333. But the problem in *Hosking* was that the district court found that the costs were not appropriately included in restitution order and then, rather than determine the appropriate amount of restitution, merely cut the claimed costs in half. *Id.* at 334. Conversely, here the only component of the award that is unclear is the "other expenses" category, which we have vacated. And we reject Robers's argument that the remainder of the restitution order was not sufficiently explained.

As noted, other than his challenge to "attorney's fees" and "other expenses," Robers does not challenge individually the other line-item expenses, merely stating that they are all consequential or incidental expenses that cannot be recovered. We have held that con-

sequential or incidental expenses are not compensable under the MVRA. *Shepard*, 269 F.3d at 887 ("Both § 3663A and its predecessor § 3663 have been understood to require restitution only for direct losses and not for consequential damages and the other effects that may ripple through the economy."); *United States v. Arvanitis*, 902 F.2d 489, 497 (7th Cir. 1990) ("In the case of restitution for offenses resulting in the loss of property, 18 U.S.C. § 3663(b) limits recovery to property which is the subject of the offense, thereby making restitution for consequential damages, such as attorneys fees, unavailable."). But we have also explained that the "direct" versus "consequential and incidental" demarcation is not exactly helpful. *United States v. Scott*, 405 F.3d 615, 620 (7th Cir. 2005). Rather, the better question is whether the injury is to "property," which is recoverable under the MVRA, or other losses, which are not. *Id.* 619-20.

In *Scott*, we explained this principle, while holding that an order of restitution appropriately included the cost of an audit:

> The audit expense, though a loss to Scott's employers, was not a gain to him. But it was a form of damage to the [victim-] employers' property. Suppose money was stolen from a bank and eventually returned, but the bank incurred a bookkeeping cost in determining whether the entire amount stolen had been returned. That cost would be a diminution in the value of the bank's property, caused by the theft, and would therefore be a proper item for restitution. See *United States v. Donaby*, 349 F.3d 1046, 1051-54 (7th Cir.

2003); *United States v. Rhodes*, 330 F.3d 949, 953-54 (7th Cir. 2003); *United States v. Hayward*, 359 F.3d 631, 642 (3d Cir. 2004). This case is no different.

Id. at 619.

Like *Scott*, we conclude in this case that the remainder of the line-item expenses fall on the injury-to-property side of the line. The property damaged by Robers's fraud was capital and to recoup that capital, Fannie Mae and then MGIC had to incur numerous expenses to safeguard, keep up, and dispose of the collateral that secured the loan. The only way MGIC was able to regain its capital at the end of the day, at the value it recovered on resale, was by expending cash up front. For instance, if real estate taxes were not current, the buyer's offer would be lower by an equal amount. If title insurance were not provided, the purchase would be riskier and the buyer would be only willing to purchase at a lower price. If a realtor were not hired, the property would not be marketed as effectively, again leading to a lower amount. And maintenance and utilities expenses preserved the collateral, and insurance safeguarded the collateral while the victim attempted to mitigate the damage to its property. In other words, the amounts expended by the victim to achieve the final disposition of the collateral real estate were incurred solely to rectify, to the extent possible, the damage to the capital. These expenses are directly related to Robers's fraud

and are thus recoverable.[14] Accordingly, we affirm the restitution award, other than the award for attorney's fees and "other expenses," which we vacate, and we remand for entry of judgment consistent with this opinion.

III. Conclusion

Robers's fraud deprived his victims of cash. Under the MVRA, restitution of the property stolen—here cash—was mandatory. Because cash was stolen and cash was not returned to the victims until the collateral securing the fraudulent loans was sold, under the plain language of the MVRA the value of the property returned on the date of its return is the amount of cash recovered at

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[14] The Eighth Circuit in *United States v. Alexander*, 679 F.3d 721 (8th Cir. 2012), upheld a restitution award to HUD that included foreclosure expenses. The court in *Alexander*, though, held that foreclosure expenses were recoverable under the MVRA because HUD was a victim of the crime and "was responsible for making such a payment to the lender based on its guarantee of the mortgage loan." *Id.* However, in the case before us, the government seeks restitution to MGIC, not as a victim, but because it is subrogated to the lender's interest pursuant to 18 U.S.C. § 3664(j)(1). Being subrogated to Fannie Mae's interest, then, means that MGIC steps into the shoes of Fannie Mae and cannot recover merely because it paid Fannie Mae's insurance claim. *See Shepard*, 269 F.3d at 887. Thus, *Alexander*'s analysis is inapplicable and, as we have done above, we have focused instead on the restitution due to MGIC not as an insurer, but as if it were the lender.

the time the foreclosed real estate was eventually resold. In a stagnant, declining market, house values will decrease and this reduction in value of the real estate is a risk that falls on Robers, the one who defrauded the victims. The loss in value of the real estate and the various line-item expenses incurred by the victims while attempting to convert the collateral back to cash are directly caused by Robers's fraud and constitute recoverable damages to his property. Attorney's fees for collecting a debt, though, are not properly recoverable under the MVRA and "other expenses" may not be. Accordingly, we vacate that portion of the restitution award. For these reasons, we AFFIRM IN PART, VACATE IN PART, and REMAND to the district court for entry of a restitution order consistent with this opinion.

9-14-12

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

September 14, 2012

Before: JOEL M. FLAUM, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No.: 10-3794	UNITED STATES OF AMERICA, Plaintiff - Appellee v. BENJAMIN ROBERS, Defendant - Appellant
Originating Case Information:	
District Court No: 2:10-cr-00095-RTR-1 Eastern District of Wisconsin District Judge Rudolph T. Randa	

We **AFFIRM** in part, **VACATE** in part, and **REMAND** to the district court for entry of a restitution order consistent with the opinion. The above is in accordance with the decision of this court entered on this date.

form name: c7_FinalJudgment(form ID: 132)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 28, 2012

Before

Daniel A. Manion, *Circuit Judge*

Diane S. Sykes, *Circuit Judge*

No. 10-3794

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN ROBERS,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 10 CR 95

Rudolph T. Randa,
Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by defendant-appellant, no judge in active service has requested a vote on the petition and all judges on the original panel have voted to deny rehearing.[1] The petition is therefore DENIED.

[1] Judge Flaum, although on the original panel, did not participate in the consideration of the petition for rehearing.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

V.

BENJAMIN ROBERS

JUDGMENT IN A CRIMINAL CASE

Case Number: **10-CR-95**

USM Number: **10551-089**

Christopher D. Donovan
Defendant's Attorney

Carol L. Kraft
Assistant United States Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) **One (1) of the Information**

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1343	Wire Fraud	October 28, 2005	1

The defendant is sentenced as provided in Pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States attorney of material changes in economic circumstances.

November 22, 2010
Date of Imposition of Judgment

s/ Rudolph T. Randa
Signature of Judicial Officer

Hon. Rudolph T. Randa, U.S. District Judge
Name & Title of Judicial Officer

December 1, 2010
Date

AO 245B (Rev 06/05) Judgment in a Criminal Case
Sheet 4 - Probation

Defendant: **Benjamin Robers**
Case Number: **10-CR-95**

PROBATION

The defendant is hereby sentenced to probation for a term of **Three (3) years. Probation shall commence today.**

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and two drug tests thereafter within one year.

- ☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 4A - Probation

Defendant: **Benjamin Robers**
Case Number: **10-CR-95**

ADDITIONAL PROBATION TERMS

1. The defendant is to participate in a program of testing to include not more than six urinalysis tests per month and residential or outpatient treatment for drug and alcohol abuse, as approved by his probation officer, until such time as he is released from such program. The defendant shall pay the cost of this program under the guidance and supervision of his supervising probation officer. The defendant is to refrain from excessive use of alcoholic beverages throughout the supervised release term.

2. The defendant is to pay the Restitution at a rate of not less than $100.00 per month. The defendant will also apply 100 percent of any annual federal and/or state tax refund toward payment of Restitution. The defendant shall not change exemptions claimed for either federal or state income tax purposes without prior notice to his supervising probation officer.

3. The defendant shall not open new lines of credit, which includes the leasing of any vehicle or other property, or use existing credit resources without the prior approval of the supervising probation officer. After the defendant's court ordered financial obligations have been satisfied, this condition is no longer in effect.

4. The defendant is to provide access to all financial information requested by his supervising probation officer including, but not limited to, copies of all federal and state income tax returns. All tax returns shall be filed in a timely manner. The defendant shall also submit monthly financial reports to his supervising probation officer.

AO 245B (Rev 06/05) Judgment in a Criminal Case
Sheet 5 - Criminal Monetary Penalties

Defendant: **Benjamin Robers**
Case Number: **10-CR-95**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$100.00	waived	$218,952.18 due joint and several (See Below)

☐ The determination of restitution is deferred until _____ An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
American Portfolio		$166,000.00 due joint and several with Jose Cortez Valadez, Case No. 07-Cr-158 and John Beumenet, Case No. 09-Cr-194	
MGIC		$52,952.18 due joint and several with James Lytle, Case No. 07-Cr-113, Bradley Hollister, Case No. 08-Cr-228, and Eric Meinel, Case No. 09-Cr-217	
Totals:	$ _____	$ 218,952.18	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Defendant: **Benjamin Robers**
Case Number: **10-CR-95**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____(e.g., months or years), to commence _____(e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____(e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Defendant and Co-Defendant Names, Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

Benjamin Robers; 10-Cr-95-001; $218,952.18; $166,000.00 to American Portfolio; $52,952.18 to MGIC;
Jose Cortez Valadez; 07-Cr-158-001; $166,000.00 to American Portfolio;
John Beaumont, 09-Cr-194-001; $166,000.00 to American Portfolio;
James Lytle; 07-CR-0113-001; $52,952.18 to MGIC;
Bradley Hollister, 08-Cr-228-001; $52,952.18 to MGIC;
Eric Meinel; 09-Cr-217-001; $52,952.19 to MGIC.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BENJAMIN ROBERS,

Defendant.

Case No. 10-CR-95

Milwaukee, Wisconsin

November 22, 2010

TRANSCRIPT OF SENTENCING

BEFORE THE **HONORABLE RUDOLPH T. RANDA,**
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

For the Plaintiff:

United States Attorney
By: **Ms. Carol Kraft**
Assistant U.S. Attorney
530, U.S. Courthouse
517 E. Wisconsin Ave.
Milwaukee, WI 53202

For the Defendant:

Pruhs Law Office
By: **Mr. Christopher Donovan**
Attorney at Law
757 N. Broadway
Milwaukee, WI 53202

REPORTED BY:

HEIDI J. TRAPP
Federal Official Court Reporter
310, U.S. Courthouse
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 297-3074

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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TRANSCRIPT OF PROCEEDINGS

THE CLERK: Case Number 10-CR-95, United States of America vs. Benjamin Robers. Called for a sentencing hearing. May I have the appearances, please. First for the Government.

MS. KRAFT: Good afternoon, Your Honor. Carol Kraft, Assistant United States Attorney, appears on behalf of the United States. With me at counsel table this afternoon is Agent Michael Sheen. He's from the F.B.I. Kenosha resident agency and he was the chief investigating Officer on this case and is also here because the prosecutor intends -- the Government intends to present some testimony this afternoon on the issue of restitution.

THE COURT: All right. Good afternoon.

MS. VODAK: Good afternoon, Your Honor. Eileen Vodak with the Probation Office.

THE COURT: Good afternoon.

MR. DONOVAN: Attorney Chris Donovan appearing on behalf of Mr. Robers, who is here in person.

THE COURT: Good afternoon. The case is here for sentencing, and the Court put this off for purposes of the restitution -- primarily for the restitution issue. And the Court has read the Government's memoranda, defense submissions, the other matters relative to the addendum which contains the objections, and is prepared to proceed. Before I do, I have to

inquire of you, Mr. Robers, as to whether or not you've had the same opportunity. So I will ask you, have you had the opportunity to go over all of this with your attorney, Mr. Donovan?

THE DEFENDANT: Yes.

THE COURT: Besides what's submitted, do you or Mr. Donovan have any further objections to any of the factual statements in the report?

THE DEFENDANT: No.

THE COURT: Does the Government have any additional objections or any objections to any of the factual statements in the report?

MS. KRAFT: Not the factual statements, Your Honor. The restitution that was set forth in the original memorandum that was presented by Ms. Vodak asserted that $136,000 was owed to American Portfolio. In my response, which -- all of my responses I guess in this case have been late. The original objections were filed in this case while I was out of the office on vacation, and so when I came back I filed the response to those original objections. It was too late for Ms. Vodak to include in the addendum to the PSR, but I had had it delivered to the Court prior to the time that this was last scheduled for sentencing. In that I attempted to correct the -- that figure. The proper figure is 166,000. I talked with Miss Vodak this morning, and she told me that she had checked her notes and she

agrees that the $136,000 was in error. That she had calculated that based on a $300,000 sales price, which was a sales price that was part of the scheme. It was not the transaction that involved Mr. Robers, however. It was a prior transaction in which the property was transferred from John Boumenot to Jesus Cerna (phonetic) for $300,000, and then 6 months later it was transferred from Mr. Cerna -- well, actually Jose Valadez posing as Mr. Cerna, to Mr. Robers for $330,000. So she indicated to me that that was the correction that she would be prepared to agree with. Other than that, I don't have any disagreements with anything that's in the PSR report.

THE COURT: And Probation agrees that that's the appropriate amount relative now, and that applies to the Inlet Shores property and the Grant Street property?

MS. VODAK: Yes, Your Honor.

THE COURT: All right. The Court will proceed to sentencing, but since the issue is -- as the Court has indicated, revolves essentially around the restitution amount, I assume the Government is going to call their witness now?

MS. KRAFT: I am. I have two witnesses Your Honor, when I filed my memorandum -- again, I apologize for that being late. Mr. Robers filed his on Thursday, and I just didn't have a chance to respond to it before Saturday. So I'm -- obviously the Court has had an adequate opportunity to review it. The law that I set forth in it and the arguments that I made are

essentially the same legal analysis that I've relied on for all of the Defendants in this case, most of whom have stipulated -- I think all of them have stipulated to the restitution amounts. Mr. Robers objects with respect to the restitution to both the amount to M.G.I.C., and the amount to American Portfolio. So I have Jim Farmer here today. James Farmer. He's from M.G.I.C., the Mortgage Guarantee -- Mortgage Insurance Guarantee Corporation. And he is here to explain the expenses that were incurred as a result -- how it is that Mortgage Insurance Guarantee Corporation acquired the loss on this, and what the loss figures are, and how he got to them. So he's present and ready to testify.

THE COURT: All right.

JIM FARMER, called as a witness, having been first duly sworn, on oath testified as follows:

THE CLERK: Please state your full name, and spell your last name for the record. State your full name and then spell your last name.

THE WITNESS: My name is Jim Farmer. My last name is spelled F-A-R-M-E-R.

DIRECT EXAMINATION

BY MS. KRAFT:

Q. Mr. Farmer, how are your employed, please?

A. I work at Mortgage Guarantee Insurance Corporation.

Q. And can you tell us how long you have worked at Mortgage

Guarantee Insurance Corporation?
A. Since 1987.
Q. And what is your -- what is your job title there?
A. Currently I work in the quality assurance area of our company.
Q. I'm sorry. In the what?
A. Quality assurance review of -- of our company.
Q. And can you tell us whether or not -- well, specifically what does that entail? Just briefly.
A. Currently I look at transactions that have -- through the Claims Department of our company. I look at what has -- you know, what's being paid, the circumstances surrounding the loss, things like that. And looking at how the different Departments have worked on them.
Q. And what, exactly, is Mortgage Insurance Guarantee Corporation? What exactly does your company do?
A. M.G.I.C., which is the acronym for Mortgage Guarantee Insurance Corporation, is -- we insure loans against default. When loans are made, typically -- it started back -- the company started back in the 50's. Loans that were made with less than a 20 percent down payment were considered high risk loans. And Mortgage Guarantee Insurance Corporation came about as a means to lower the risk to financial institutions by offering insurance against a default.
Q. And when a financial institution or a lending institution

approaches M.G.I.C. in the -- in a request for mortgage guarantee insurance, what -- generally what types of information are they required to present in order to obtain that type of insurance?

A. Depending on the program that's being insured, typically the lender has to provide the underwriting terms or an underwriting package that has to be reviewed so that that can be either -- sometimes -- we've had different programs that have been insured. This particular one I believe was one that was probably an underwriting package that was submitted to be reviewed, and then underwritten and insured.

Q. Okay. Now, when you say this particular one, I'd like to direct your attention to a claim that involved a property at 911 Grant Street in Lake Geneva, Wisconsin. Are you familiar with that claim?

A. Yes.

Q. And what lending institution submitted that claim to M.G.I.C.?

A. Countrywide, which is now Bank of America, submitted this claim on behalf of Fannie Mae.

Q. And have you reviewed certain documents from the original loan file earlier today when we discussed your potential testimony?

A. Yes.

Q. And from those documents were you able to ascertain that the

original lender in this particular transaction was Paragon Lending?

A. Yes. That was the institution that actually filed for the insurance benefits at the beginning when the loan was insured.

Q. And did -- and so that -- did Paragon Lending maintain possession of both the note and the servicing of this particular loan?

A. When the loan was made, I -- obviously I don't really know what transpired. They were the entity that filed for the insurance, representing that -- you know, and then from there the loan, you know, gets transferred, sold to, you know -- probably got sold immediately to Fannie Mae, would be my guess, and then servicing was probably already in the works to be transferred as well.

Q. Okay. So I don't want to put words in your mouth, but just so we're clear, the original lender was Paragon Lending, and they are the lending institution that applied for mortgage guarantee insurance from M.G.I.C.?

A. Yes, that is correct.

Q. And then at some time thereafter Fannie Mae acquired the loan note itself?

A. Correct.

Q. And Countrywide assumed the servicing for the note?

A. That is correct.

Q. And at a later point in time, then, did one of those

entities file a claim with M.G.I.C. for a default on the note?
A. That's correct. Countrywide filed the claim on behalf of Fannie Mae.
Q. Countrywide filed a claim on behalf of Fannie Mae. All right. And when it did that, did it present certain losses and identify the source of those losses in support of its claim?
A. Yes. They submitted a claim for loss form, and their expenses were in line with the master policy for which we operate off.
Q. And you have a document in front of you which we've marked as Exhibit Number 1 for identification purposes, is that correct?
A. Yes.
Q. And I've submitted the Exhibit to the Court for the Court's review as well, and counsel has a copy. Do you recognize this, Mr. Farmer?
A. Yes.
Q. And what is this?
A. This was an outline that I had put together identifying basically how M.G.I.C. identified the loss that we sustained from insuring this loan.
Q. Okay. And can we just go through some of these expenses. So you reviewed the file and the --
A. Well, somebody in our company did. I didn't personally process the claim, no. But the -- when the lender -- the lender

obtained the default under the terms of the mortgage. A default can be, for example, the failure to pay the mortgage payments when they're due. Then they take action by accelerating the note and foreclose. After they foreclose and take title, they're eligible then to submit a claim to M.G.I.C. because they've suffered under the terms of our policy because of the fact that they are now entitled, from -- as a result of the default that we insured. And from there M.G.I.C. will then evaluate the lender's -- you know, eligibility for the claim and determine what our -- what option we want to take in settlement of the claim.

The -- M.G.I.C. has two options. One is that we can pay what's called a percentage option. The other option is that M.G.I.C. can acquire the property from the lender, and then liquidate it ourselves, thereby hopefully reducing the loss that we would sustain. And in this case, for example, the loss that is outlined here, is less than what we would have paid if we had just picked the percentage option when the claim was submitted.

Q. Okay. So let's start at the top of this. It says unpaid principal balance. That's a figure that you obtained -- that M.G.I.C. obtained from the lender representing the unpaid principal balance of the loan at the time of the default, is that correct?

A. Correct.

Q. And then there is also a figure that represents accrued

interest, is that correct?
A. Yes. That's from the last paid installment date up until the -- until the date the claim is basically settled.
Q. Okay. And then attorney's fees. What would those have been for?
A. Those are the lender's attorneys fees and actions. They could be in regards to foreclosure, eviction, any of those -- bankruptcy, any of those actions.
Q. Okay. So you didn't break those down, but you know that that's --
A. -- I did not --
Q. -- a claim that they filed?
A. I did not. Just told --
Q. And then property taxes. Why would property taxes be included in the claim?
A. The lender advanced property taxes during the time of -- after the borrower had defaulted, and so these are the property taxes for which they had already advanced.
Q. Okay. And then there's a category that says other expenses. Do you know what that is?
A. I don't know. I didn't -- I don't have that itemized. But usually things that are in the other expense category are things like appraisals, broker price opinions, things like that.
Q. And those are things that are undertaken in order to attempt to sell the property and mitigate the damages, is that correct?

Mitigate the loss?
A. Yes.
Q. Okay. And then you have in here hazard insurance. Why would that be an expense?
A. The lender would have advanced hazard insurance to protect their collateral, so that if the loan was also escrowed, which this one was, they're paying the taxes and insurance every year, regardless if they're collecting the money from the borrower to pay them. So they're keeping those in force until the time that they submit their claim.
Q. Okay. And then property preservation. Can you tell us what that would include?
A. Property preservation includes things like utilities, yard maintenance, property inspections that the lender may have done. Anything that's going to basically protect and preserve property.
Q. To keep the property from losing value until it can be sold?
A. Yes. The thing is, you want to make sure that -- for example, keeping utilities on so that the sump pump can run. Things like that.
Q. And then there are statutory disbursements. Can you tell us what those are?
A. Statutory disbursements are the foreclosure -- we refer to them as the foreclosure costs, eviction costs. They would be costs associated with taking some sort of action that is not for

legal fees, but it's other costs incurred in those particular actions.

Q. Okay. And then it says less ending escrow balance. What does that mean?

A. At the time that the -- what we do to process the claim is that there was an escrow balance at the time that the last paid installment was made, and so we deduct that, because that's a positive amount. So we deduct that from the claim, and then let them claim all the advances they make after that date.

Q. So according to this your total payment to the lender under the insurance policy was $159,214.91, is that correct?

A. That's correct.

Q. Now, you indicated that as opposed to paying a percentage of that under the policy, you chose to acquire the property, which I assume had already been acquired by the lender as part of the foreclosure proceedings, is that right?

A. That's correct. I mean, that's another thing that they would be required to do, would be to transfer the title to us.

Q. So that unless Mr. Robers had agreed in some way to sign over the warranty deed to the lender, the lender would have essentially had to go through the foreclosure in order to gain possession of the property?

A. Yes. That, or deed in lieu of foreclosure.

Q. Now, you indicated that you decided to acquire the property because you thought you could mitigate the expenses or the loss

that you suffered as a result of the default on this loan, is that correct?

A. That's correct. Well, to mitigate that loss.

Q. Mitigate it. And so is that what we have under the R.E.O. expenses?

A. Yes. After M.G.I.C. or any institution, I suppose, acquires a property, we -- we did carry insurance on the property ourselves. We did have the utilities put in our name so that we could have utilities on. We obtained a title commitment so that we could guarantee that we had clear title transferred from Fannie Mae to M.G.I.C. We had to order our own opinion of value so that we can make our assessment. And then we did -- there was a claim investigation done at the time when the claim came in, as well.

Q. And eventually you did sell the property?

A. Yes, we did.

Q. For 107,000 -- excuse me, $118,000, is that correct?

A. That is correct.

Q. And then what are these other expenses associated with the sale?

A. We paid a real estate broker to manage the property for us, and then they earned that -- that fee in selling the property. Prorated taxes that were on the settlement statement. Those were the taxes that had accrued and not yet been paid, but they were charged to M.G.I.C. as the seller. We had to pay for an

owner's title policy at closing. And then the other settlement charges are things like recording costs and things like that.

Q. So your net proceeds, then, were $107,908.93?

A. That's correct.

Q. And so you were able to actually substantially reduce the loss on this claim that resulted from the fraudulent sales -- sale in the first instance, by taking the property and R.E.O. and expending these additional monies in order to liquidate it, is that correct?

A. Correct. It was a way to mitigate our loss. To reduce it.

Q. And so your final loss was $52,952.18?

A. Correct.

MS. KRAFT: That's all. I don't have anymore questions for Mr. Farmer. I would ask that Exhibit Number 1 be received and made part of the record at this hearing, Your Honor.

THE COURT: The Court will receive Exhibit 1, make it part of the record. Any cross examination?

MR. DONOVAN: Yes, Your Honor.

CROSS EXAMINATION

BY MR. DONOVAN:

Q. I'd like to briefly go through again the ownership. You said the first lender was Paragon Lending?

A. That's who the insured was at the time that the loan was -- that the insurance was written.

Q. And do you know what their loan amount was?
A. I'm sorry. I didn't hear you.
Q. Do you know what their loan amount was? How much did they lend?
A. What the original loan amount was?
Q. Yes.
A. I didn't look that up. I'm sorry. Whatever the original loan was. It was taken out for.
Q. So then Paragon at some point sold to Fannie Mae, is that correct?
A. Yes. At some point in time the loan was sold to Fannie Mae.
Q. Do you know what Fannie Mae paid for the loan?
A. No. I would not know that, no.
Q. Because, again, you -- basically your company just provides insurance in case of default, right?
A. We insure the loan against default.
Q. Now, does that coverage carry over every time the property -- or I'm sorry. Not the property. Every time the loan is sold, does that coverage carry over?
A. There are provisions within our policy that allow for transfers like this, for the insurance then to survive that kind of an assignment.
Q. So even though Paragon was the first lender, that coverage carried over to Fannie Mae, correct?
A. Correct. It would just simply be assigned.

Q. And again, you don't know what Fannie Mae paid for the loan. You don't know if it was the full amount?
A. No. There would be no way for us to know that.
Q. Okay. And then was Fannie Mae -- you said that Countrywide serviced the loan. But did Fannie Mae remain the owner at that point?
A. Typically that -- yes. Fannie Mae doesn't service their own loans.
Q. And Countrywide, on behalf of Fannie Mae, is the one who filed the claim with you?
A. That's correct.
Q. Okay. Now, is it safe to say up to the point where the property went into foreclosure, you had no control over it. No ability to do anything with it, correct?
A. I'm not sure I understand.
Q. Okay. I'm sorry. Let me try to make it more clear. So your involvement begins when there's a default. That's what you insure against?
A. When the loan is in default, the servicers file what's called a notice of delinquency to us, to make us aware of the fact that a loan that we insured is in default. So that is when -- they would submit that usually within like 4 months of the default.
Q. Okay. Do you know how many payments were made on this property before it defaulted?

A. I didn't look. I'm sorry.
Q. So at what point were you contractually obligated to pay the loss amount?
A. The -- once the lender took title and was in possession, we were able to then ascertain what their loss was and their position was to be in a claimable position. And that's when we then took and made the decision that we made to acquire, as opposed to just paying the percentage option.
Q. Now, when you take control of the property, as opposed to settling for a percentage, is it typical that you want to just basically cut your losses and sell the property as quickly as possible?
A. That's not really our model, no.
Q. What would you say your model is?
A. Our model isn't to -- because I'm not sure I understood your question, but it sounded to me like you're asking do we almost fire sale our properties. We do not. First of all, M.G.I.C. is not a lending institution. So the one thing is that we -- the properties that we acquire -- typically we want to make sure that they're in good condition and that they can be finance-able, because we're -- they have to be put out there for anyone to finance, including things like V.A. and F.H.A. So we want the properties to show well so that any buyer would be -- anyone off the street could walk in and purchase the property. Not target them, for example, to just say a group of investors.

That's really not the way that we acquire and sell properties.
Q. You could have held the property, correct?
A. I beg your pardon?
Q. You could have continued to hold the property and try and sell it at a higher price, correct?
A. I don't know what you mean by continued to hold it and sell it at a higher -- the property was acquired. Was placed on the market. And then -- you know, and then based upon feedback from our broker and from potential people who had viewed the property we made the decision that we made to liquidate it.
Q. And, again, that was your decision when and how to sell it, correct?
A. I'm sorry?
Q. It was your decision, the company's decision, on where and when to sell it, correct?
A. Yes.
Q. Did you have an appraisal done at that time? After you took control of the property?
A. We took the -- we did the evaluation before we acquired the property. And then we just get updated values after the property is acquired.
Q. I'm sorry. What do you mean by updated values?
A. In other words, if the property has not sold within let's say 90 days, then we'll ask the broker to send us a new broker's price opinion. Giving us new comps. Telling us what's going on

with the market. In other words, has the market shifted? You know, are there things we need to be concerned with? All of a sudden do we have a lot more inventory in a given market? You know, things like that, that would influence. You know, maybe -- there's other things that could influence it, too, but that's the reason why we ask them to give us updated marketing information so that we know what's going on with the market so we can make the decisions that we make.

Q. But again, that's not the same as an appraisal?

A. A broker's price opinion?

Q. Right.

A. We don't -- we use broker's price opinions. We don't use appraisals. We only use appraisals if we can't get broker's price opinions.

Q. Okay. So again, I just want to clarify. You don't know what Fannie Mae bought the loan for from Paragon, so you don't know if they suffered a loss on what they bought the loan for, correct? It could have been for the full amount of the loan. It could have been for a fraction of it. You just don't know?

A. I don't know how that is structured, no.

Q. And you acquired this property again singly pursuant to a contract, right? This wasn't a package where you got a bunch of properties. This was just because of the one default?

A. Right. The thing is, is that it's insured under a master policy. The lender's filing a claim under the terms of a master

policy between us and that lender.
Q. Okay. Now, referencing Exhibit 1 -- and I know the Government went through these numbers. I'm not going to go through them again. But is it fair to say the figures listed under claim, down to total claim paid, those are -- those are fees that were incurred before you took ownership, correct?
A. Took -- yes, that is correct.
Q. And then the expenses from R.E.O. expenses down to that next total expenses was fees that you incurred after you took ownership?
A. Correct.
Q. And then between recovery from sale and proceeds, that was further fees and different items that you incurred trying to sell the property?
A. That is correct.
Q. So let me back up to the first block of numbers under the original claim that was incurred before -- before you took ownership. These numbers were just provided to you from Fannie Mae?
A. Countrywide.
Q. I'm sorry. Countrywide?
A. Filed this. They're the ones who submitted this.
Q. Did you do any independent investigation or do you have any independent knowledge of these numbers? Or was it just basically a spreadsheet like this one that was handed to you?

A. No. They submit documentation such as their mortgage loan history, for example. Things like that. To identify what they are.

Q. So it's a more kind of detailed package than this? It's not just a summary?

A. Yeah, it's not -- it's not this.

Q. But you didn't review that yourself?

A. Pardon me?

Q. You didn't review that yourself? I believe you testified that someone else --

A. I took the information from our system.

Q. Okay.

A. I mean, you know, the thing is somebody else reviewed the claim.

Q. Okay. So again I'm asking I guess your personal knowledge. Was this just -- did you just take these numbers out of the system without further analysis or investigation? Yourself. You personally.

A. I didn't -- I did not analyze the claim, if that's what you're asking.

Q. Right. So actually -- let me back up a little more. Did you prepare the spreadsheet? You prepared Exhibit 1, correct?

A. Correct.

Q. And so the numbers between the first claim and the first total claim paid, those are all just numbers that you transposed

from other sources, is that fair to say?
A. From other sources? They're the -- it's the data that's on our system that we use to manage our claims.
Q. So you just pulled those off the system and put them here, correct?
A. Yes, I did.
Q. And then how about -- the same question with -- between the R.E.O. expenses and the total expenses. Again, did you just pull those from the system? Or did you figure these yourself independently?
A. Those were the items that were actually paid out. Those -- I took those from our financial transaction system. Those were all bills that had actually been paid.
Q. Okay. Do you know, for example, the broker's commission? What percentage that came out to be?
A. I'm going to guess that it's 6 percent.
Q. Is that standard?
A. That's standard in the State of Wisconsin, yes.
Q. Do you ever have properties you dispose of where the broker takes less?
A. Trying to think. It would have to be very special type of circumstances where, for example, the lender -- or the realtor really didn't actually market the property. They just simply maybe closed the transaction for us, or something. I don't know. But typically, no. We -- we usually pay whatever the

standard commission is in a given State. We don't usually pay less.

Q. But you chose the broker, correct?

A. We chose the real estate broker, yes.

Q. And then you chose to continue to pay taxes on the property to keep current on the property tax, correct?

A. We chose to pay the property taxes so that they don't become a priority lien against the property.

Q. Right. But that's a decision that your company made, right? To keep the taxes current?

A. Yes. So it doesn't go into tax default. But we actually -- M.G.I.C. didn't actually advance any property taxes on this.

Q. I'm sorry? What?

A. M.G.I.C. didn't actually advance any property taxes. The property taxes that were paid were a proration at the time of the sale. When you close on a -- when you close or sell a piece of property, you have a seller and a buyer. And the property taxes are prorated for whatever the fiscal year is for that particular property. So that the seller is responsible from the beginning of the fiscal year until the date the transaction closes. And then the purchaser or buyer is responsible for them after that. Since taxes are paid in the State of Wisconsin annually, then the taxes here -- I don't remember what day we closed, but whatever the taxes had accrued and had not yet been paid, we paid for that portion of the fiscal year. So that then

the buyer would then be responsible for paying the remaining part of it when the taxes came due.

MR. DONOVAN: Thank you for the explanation. I have no further questions.

THE COURT: Any redirect?

MS. KRAFT: Just a couple questions.

REDIRECT EXAMINATION

BY MS. KRAFT:

Q. Just so that we're clear, when the claim is filed, the lender provides documentation to M.G.I.C. to support the things that are in the claim, is that correct?

A. Yes.

Q. And those items are taken by someone else in your company, but taken and entered into a system that is part of your regular business records, is that correct?

A. We have two ways of doing it, but yes, we can enter the data into the system, and we have the means for the lender to enter it directly for us. And then we just double check it.

Q. And so when you brought your file here today and reviewed the file in advance in order to prepare this spreadsheet, you took information that had already been provided to your company in connection with this claim that was -- that is supported somewhere in your business records, is that correct?

A. Correct. Another work group.

Q. You just didn't make these numbers up because they seemed

like good numbers, did you?

A. No. These were the numbers that were used in settling the claim.

MS. KRAFT: Okay. Thank you. I don't have anything else.

THE COURT: Anything else?

MR. DONOVAN: Just a couple follow-up.

RECROSS EXAMINATION

BY MR. DONOVAN:

Q. In this case do you know if the lender entered the numbers directly? Or did someone from your company?

A. Pardon me?

Q. I believe you said there's two ways the numbers can be entered into the system. One is you do it. Someone at your company. Or the other is the lender does it directly and then you double-check, correct?

A. Correct.

Q. Do you know which one happened in this case and for this property?

A. This one we entered.

Q. You entered?

A. We entered the information from the customers. The customers sent this in to us via paper.

Q. Okay. And then one other question. How does your company decide whether to acquire the property, or do a percentage

settlement?
A. We have a computer model that we enter all the different data from regarding the claim amount; the -- what the projected sales price would be; how much we think that we would have to take care of utilities and property maintenance; whether or not we feel that we have to do any repairs to the property; things like that. We enter it all into a model, and the model then tells us what the -- what would be the best outcome for us to pursue.
Q. So fair to say it's a pretty deliberate choice on your part, and obviously at this stage you know that the house is in default, so you're trying to make the best decision you can to mitigate your loss, correct?
A. Right. M.G.I.C. is wanting to obviously reduce the loss to whatever extent that we can.
Q. And I guess my final question would be do you know what causes the property to lose value? For example, if the original loan amount was 140,000, you eventually sell it for 118, what can cause that loss? Do you know what causes it?
A. Well, I mean, there's a lot of factors that can influence that.
Q. Can you name any?
A. One might be the fact that in a given community -- let's say that they have one major employer, and the employer shuts down. That could have a major impact in the value of a property. You

could have -- the individual property itself could be influenced by several different things. Maybe, you know, the City's gone in and decided to do some sort of special assessment in the area and now, you know, somebody doesn't want to take on those responsibilities. It could adversely influence the value of the property. I don't know.

Q. Fair to say that the general real estate market could impact the value of the property?

A. I'm sorry?

Q. Is it fair to say that the general real estate market at the time can impact the value of the property?

A. Yes. You mean like the current situation?

Q. Correct.

A. Yes, that can certainly influence it.

MR. DONOVAN: I have no further questions.

THE COURT: All right. Anything else of this witness?

MS. KRAFT: I don't have anymore questions from Mr. Farmer. But if the Court doesn't have anymore questions, if he could be excused?

THE COURT: All right. You may step down, Mr. Farmer. Thank you. Watch your step, please.

THE WITNESS: All right.

MS. KRAFT: I also at this time, Judge, wanted to call Agent Sheen for some brief testimony. There were assertions in Mr. Donovan's submission to the Court that I think are factually

incorrect, and I wanted to clarify some of those in terms of how they relate to the investigation, and also address the actual -- the things that pertain to Mr. Donovan's last line of questioning about things that -- other than the real estate market which might affect -- which might have affected the value of these properties, such as inflated appraisals. And so I would like to call Agent Sheen at this time.

THE COURT: All right.

AGENT MICHAEL SHEEN, called as a witness, having been first duly sworn, on oath testified as follows:

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Michael Sheen, S-H-E-E-N.

DIRECT EXAMINATION

BY MS. KRAFT:

Q. How are you employed, sir?

A. I'm an Agent for the Federal Bureau of Investigation.

Q. How long have you worked for the F.B.I.?

A. Approximately 7 years.

Q. And can you tell me whether you were the Agent who initiated the investigation which includes the transactions to which the Defendant has pled guilty, has indicated that he was involved in, with regard to mortgage fraud.

A. Correct. Yes, I am.

Q. And did this investigation begin actually in early 2006? Is

that correct?
A. Correct.
Q. With the investigation of a person by the name of James Lytle?
A. Correct.
Q. And was Mr. Lytle a mortgage broker?
A. Yes, he was.
Q. And in that capacity he fabricated information in order to allow for the purchase of multiple properties by straw buyers. Would that be a fair way to characterize the overall description of this case?
A. Correct.
Q. And were there in addition -- has Mr. Lytle pled guilty and been convicted?
A. Yes, he has.
Q. And he's in prison now, is that right?
A. Correct.
Q. And in addition to Mr. Lytle, were there a total of 9 other people, including Mr. Robers, who were convicted in connection this fraud scheme?
A. Yes, there were.
Q. How many properties were involved in the scheme itself, if you remember?
A. Fifteen. Possibly more -- additional properties as well.
Q. And were they all located in Walworth County in fairly close

proximity to the subject properties that Mr. Robers is responsible for?
A. Yes, they were.
Q. 900 Inlet Shores, and 911 Grant Street?
A. Correct.
Q. Now I'd like you to focus specifically on 911 -- excuse me, 900 Inlet Shores, which is the -- not the property that Mr. Farmer talked about, but the other property that Mr. Robers is responsible for that's part of the -- actually named in the Information to which he pled guilty. How many times was this particular property sold in connection with this fraud scheme?
A. That property was sold twice, essentially.
Q. And who was the original owner of the property at the time that it was first sold?
A. The original property was owned by John Boumenot who was also indicted and charged in this matter.
Q. Okay. He was separately indicated -- or excuse me. I think he's pled guilty to an Information and was sentenced in Judge -- in another Court, is that correct?
A. Correct. Sorry. Yes.
Q. And so he was complicit in the scheme, is that right?
A. Correct.
Q. Okay. Now, the first time that the 900 Inlet Shores property sold was -- is it correct that it sold in January of 2005?

A. Correct.
Q. From Mr. Boumenot to ostensibly Jesus Cerna, is that correct?
A. Yes.
Q. Was Jesus Cerna a real purchaser?
A. He was not.
Q. Who signed the loan documents representing themselves to be Jesus Cerna in that transaction?
A. Mr. Jose Valadez.
Q. And has he also been convicted as part of this fraud scheme?
A. Yes, he has.
Q. He was pretending to be Jesus Cerna, is that correct?
A. Correct.
Q. And was he actually Jose Valadez's brother-in-law?
A. Correct.
Q. And the uncle of Martin Valadez who was one of the other major fraudsters (sic) in this case?
A. Also correct.
Q. At the time that the property was sold from -- was transferred from Mr. Boumenot ostensibly to Cerna, was there an appraisal?
A. Yes, there was.
Q. And who conducted the appraisal?
A. The appraisal was done by Alexander & Associates. And subsequent appraisals done by Knutson & Associates.

Q. Now, Alexander & Associates and Tamara Knutson, are those appraisers that were routinely used by the fraudsters (sic) in this case?
A. Yes, they were.
Q. And can you tell me, during the course of your review of the overall evidence that you collected, did the appraisers for Alexander & Associates and Tamara Knutson consistently hit the number that the mortgage broker, Mr. Lytle, was seeking to have the property appraised at? Was it consistent with the sales price that Mr. Lytle had arranged?
A. Correct.
Q. And in the first sale from Mr. Boumenot to Mr. Cerna, what was the appraised value, according to the appraisal? Do you remember?
A. I believe it was a little over $300,000.
Q. Like $304,000? That sound right?
A. 304,000.
Q. Did you have a chance to actually look at any of the public records with respect to the then existing current value of that property?
A. Yes, I did.
Q. I'm handing you what's been marked as Exhibit Number 2 for identification purposes. Can you tell me what that is?
A. That is a tax partial information sheet for this particular property, 900 Inlet Shores, for the year 2004.

Q. So that was for the tax year immediately preceding the January, 2005, sale to -- from Mr. Boumenot to Mr. Cerna, is that correct?
A. Correct.
Q. And Walworth County at that time -- they didn't value the property at 100 -- excuse me. They didn't assess the property at 100 percent of the value, is that correct?
A. Correct.
Q. They assessed it at like 75 percent, or something less?
A. Correct.
Q. What does Exhibit Number 2 show that the property was assessed at in 2004, the year before it was transferred from Mr. Boumenot to Mr. Cerna for $300,000?
A. $157,000.
Q. And what did Walworth County estimate to be the fair market value of the property at that time?
A. $206,711.
Q. Almost $100,000 less than what it was appraised by -- for by Alexander & Associates, and for what the sale price from Boumenot to Cerna was, is that correct?
A. Correct.
Q. Now, the second sale of this property in terms of the fraud scheme was from Cerna to Mr. Robers, is that correct?
A. Correct.
Q. Do you remember exactly why that occurred?

A. My understanding was that the property needed to be sold because Mr. Cerna became aware of the fraud scheme and confronted Mr. Valadez.
Q. Did he suddenly start to get default notices on a property that he never did anything to purchase?
A. Correct.
Q. So at that point is it true that Mr. Lytle and Martin Valadez made an effort to flip the property, essentially. Transfer it out of Mr. Cerna's name and into somebody else's name?
A. Yes, they did.
Q. And they approached Mr. Robers for that purpose?
A. Correct.
Q. Now, when did the sale from Mr. Cerna to Mr. Robers occur?
A. June of 2005.
Q. So that's about 6 months from the January sale from Boumenot to Cerna?
A. Correct.
Q. And what was the sale price of the property in June of 2005 from Cerna to Boumenot? Or excuse me. Cerna to Robers?
A. $330,000.
Q. Now, you've seen that property, is that correct?
A. Correct.
Q. Are you able to tell us, were there any discernible improvements in that property between the time that it was

purchased by Mr. Cerna and the time that it was purchased by Mr. Robers 6 months later?

A. Nothing that I observed.

Q. Is there any explanation for how the property could have gained $30,000 in value in that 6 month period if it wasn't a fraudulently inflated appraisal?

A. No.

Q. Now, let me ask you this. In your experience investigating these kind of cases, what happens to comparables when numerous properties within a circumscribed geographic area are inflated?

A. As the properties in the area are inflated artificially, it continues to inflate other properties. If one property is artificially inflated to $400,000, other properties that base their value off of that property of course rise up as well.

Q. So that the taxing entity, if you will, looks at the sale price to determine what a fair market value is. And if they look around and see numerous properties that have been sold at a certain price, they will then essentially inflate the -- artificially inflate the fair market value of those properties, which then can serve as comparables to appraisers who are looking to make -- to hit a certain mark, is that correct?

A. Correct.

Q. All right. Now, eventually Mr. -- the 900 Inlet Shores property went into foreclosure, is that correct?

A. Correct.

Q. And you had some difficulty ascertaining or locating the final note holder and servicer for this particular loan, didn't you?
A. Yes.
Q. Because it was sold a number of times. Ultimately who did you determine to be the final note holder?
A. American Portfolio.
Q. And are you aware that actually the Government counsel has had numerous conversations with Paul Kessell, who identified himself as the President of American Portfolio?
A. Correct.
Q. And have you also had an opportunity to review some E-mails that were received by the Government from Mr. Kessell?
A. Yes, I have.
Q. Confirming that he was the owner?
A. Correct.
Q. And that he had purchased the note from the original lender, which was M.I.T. Lending?
A. Correct.
Q. And also that at some point in time the property -- he had been successful in selling the property and that the property sold for how much?
A. The property then was sold for $164,000.
Q. And were you able to confirm those numbers by examining the public records in this case?

A. Yes, I was.
Q. Okay. Now, do you have Exhibit Number 3 in front of you?
A. Yes, I do.
Q. And can you tell us what Exhibit Number 3 is?
A. Exhibit Number 3 are the public records from 900 Inlet Shores relating to transfer fees paid during the sale of that property.
Q. Okay. And as you researched the -- well, what the transfer fee means in the course of your investigation of this. Can you tell us whether or not you determined how a transfer fee relates to a sale of a property?
A. Yes.
Q. How does it relate?
A. The transfer fee -- essentially the number paid by the -- for the transfer fee, you would divide that by three and multiply it times 1000, and that would be the actual amount of the sale.
Q. And on the document that you have in front of you, Exhibit Number 3, it shows a transfer fee. This relates to the sale of the property by John Boumenot and Marilyn Walsh to Jesus Cerna, is that correct?
A. Correct.
Q. And it says $900 in transfer fee, and then there's a handwritten notation next to it. Whose notation is that?
A. That's my notation.

Q. And it was your indication of what the transfer fee translated into, is that correct?
A. Correct.
Q. Okay. And so the -- this reflects that on January 20th of 2005 Boumenot transferred the property to Jesus Cerna for $300,000. Turn to the next page. Does the second page reflect the transfer of the property from Cerna to Robers on June 30th of 2005?
A. Yes, it does.
Q. And what does the transfer fee $990 compute into in terms of the total sale of the property?
A. Total sale is $330,000.
Q. Which is consistent with all of the loan documents that you obtained in the course of this investigation, is that correct?
A. Correct.
Q. Then there are two other -- then there's a page that shows Benjamin Robers as the owner, and mailing address for this property. And then after that there are two -- well, there's a document that transfers the property from -- on 2/21/06 from the Walworth County Sheriff to Merrill Lynch Mortgage Lending. Is that the transfer that occurred after the foreclosure?
A. Correct.
Q. And to the best of your knowledge was Merrill Lynch Mortgage Lending at that point the servicer for that loan?
A. Yes, they were.

Q. And it shows no transfer fee. What does that mean?
A. Transfer fees are not normally -- would indicate that there was no actual transaction that occurred. Essentially it goes back to the lender.
Q. Because the property didn't really sell at the Sheriff's sale. It was acquired by the lender, is that correct?
A. Correct.
Q. And then the next page on 10/2 of 2008 shows another grant from Merrill Lynch to South Star (phonetic) again for a zero transfer fee, is that correct?
A. Correct.
Q. And then finally we have on the last page a transfer from South Star to Dorian Frazier (phonetic) for the amount of $492. What does that -- on October 6th of 2008. What does that transfer into?
A. That would be a sale of $164,000.
Q. Okay. And is that consistent with the number that Mr. Kessell provided from American Portfolio about the amount of the sale for that property?
A. Correct.
Q. And are those the dates that he indicated the property was disposed of on his behalf?
A. Correct.
MS. KRAFT: I don't think I have anymore questions about this. I do want to elaborate a little bit during my

argument, but I don't have anymore questions for Agent Sheen at this point.

THE COURT: Any cross examination?

MR. DONOVAN: Thank you.

CROSS EXAMINATION

BY MR. DONOVAN:

Q. Do you know who the first lender was for this property? This 900 Inlet Shores Drive?

A. The first owner at the beginning of the scheme? Or prior to?

Q. After the mortgage was issued with Mr. Robers' name on it, who was that lender?

A. After?

Q. Yes. After Mr. Robers submitted his loan applications and went through the closing, who was the first lender on that transaction?

A. I don't have that in front of me. I'm not certain who the actual initial lender was.

Q. But you know that the loan amount was for 330,000?

A. Correct.

Q. Now, the loan was bought and sold several times, is that correct?

A. Correct.

Q. Do you know who the second lender was?

A. I do not.

Q. Do you know what they bought the loan for?
A. I do not.
Q. Do you know if it was for the full value?
A. I do not.
Q. So you don't know if the second lender reimbursed the first lender for the full amount?
A. Correct.
Q. Do you know who any of the other lenders were in the trail?
A. The eventual final owner of the -- of the loan was M.I.T., who then sold it to American Portfolio.
Q. Do you know what M.I.T. bought the loan for?
A. That I do not know.
Q. And so you don't know, then, what American Portfolio eventually bought it for?
A. They purchased it for $330,000.
Q. So they did pay the full amount?
A. Correct.
Q. So in your experience, then, doesn't that most likely mean that all the previous lenders probably paid the full amount, too? I mean, is there any reason American Portfolio would have, you know, bought a loan that they know has been in foreclosure and it's been in default for the full value of --
A. Correct.
Q. Now, when you went to review these public documents, where did you obtain them from?

A. They're accessible either by going to court, or just via the internet.
Q. Now, isn't it true that at the top of these it says this is not official information. All official information is recorded in the Land Information Office?
A. Correct.
Q. Did you actually go to the Land Information Office for Walworth County? Or just rely on these?
A. For these particular documents, these were printed online, and we obtained judgment records from the County directly.
Q. So how do you know, for example, that these documents relate specifically to 900 Inlet Shores Drive?
A. Based off the parcel number. Each piece of property has a parcel number, also known as a tax pin number, that identifies a piece of property. Referred to Exhibit 3, parcel number is FA333500001. That refers to 900 Inlet Shores.
Q. How did you link up the parcel number and the address?
A. The parcel number to the address, again, is available on the internet from Walworth County's website as far as linking the pin number to the address.
Q. All right. And how about figuring out this transfer fee formula? How did you determine that's how you extrapolate the purchase price?
A. That's how Walworth County -- their procedure for coming up with their transfer -- again, it's a link available on their

internet site. Or just upon talking to Walworth County personnel.

Q. So it's safe to say almost all of this was determined by just looking at online records. You didn't actually go and pull the records yourself. The original documents that showed, you know, what these different transfers were, and for how much?

A. Actually, no, I did basically both. Using the internet and going to Walworth County.

Q. Okay. Now, you testified earlier that -- I believe the question was along the lines of the appraisers consistently came up with the number, I guess, or whatever that Lytle wanted. Is that accurate?

A. Correct.

Q. Now, were any of the appraisers charged in this scheme?

A. They were not.

Q. And isn't it accurate to say that throughout the discovery in this case there was indications that these appraisals were legitimate?

A. The appraisals -- from what we could determine, the appraisals were requested by Mr. Lytle and some of his associates. Essentially the appraisers would hit those numbers as presented by Mr. Lytle in order to continue their business. And again, essentially those numbers were -- whatever Jim wanted those numbers to be, they would hit those numbers.

Q. Did you interview the appraisers in this scheme --

A. -- yes, we did --
Q. -- and ask them about whether they inflated their numbers or not?
A. Sorry about that. Yes.
Q. What did they say?
A. They denied any involvement.
Q. And, in fact, did you ask Jim Lytle about whether he asked them to inflate numbers or not?
A. Yes, we did.
Q. And what did he say?
A. He said that he did not ask them to.
Q. Bradley Hollister was another individual involved in this scheme, correct?
A. Correct.
Q. And he basically worked with Lytle to help plan and execute this scheme and recruit people in?
A. Correct.
Q. And I think you also asked him about whether these were false appraisals or not, correct?
A. Correct.
Q. And just with your general background and familiarity with working with these types of cases, is it safe to say that the real estate market back in 2004, 2005, was booming and prices were generally rising across the board?
A. That would be my experience.

Q. So, for example, when you testified earlier that the house sold for $300,000, and then 6 months later when Mr. Robers submitted his application, sold for 330,000, it's possible that that 30,000 could have reflected an increase in market value, correct?
A. It's possible.
Q. How many loan payments were made before it went into default? Do you know?
A. That I do not know. I don't believe they were -- I'm not certain.
Q. Do you know when the first default was? Or when the first missed payment was?
A. I do not.
Q. And then when was the foreclosure judgment?
A. I don't have the judgment in front of me. It was foreclosed in February of 2006.
Q. So just -- so actually less than a year after -- I mean, you said Mr. Robers got the loan in June of '05, is that correct?
A. Mr. Robers got it in June of '05, correct.
Q. And then do you know when the Sheriff's sale was?
A. The eventual -- I should say the Sheriff's sale was February of 2006.
Q. And then do you know, again, who the lender was at that time? Was it the original lender? Or was it a different lender?

A. The servicer was Merrill Lynch.
Q. So it's possible that the first lender was -- got all the money back and suffered no loss, is that correct?
A. I'm sorry? The --
Q. It's possible that the first lender sold the loan for the full amount and got all the money back, is that right?
A. Correct.
Q. And so, therefore, suffered no loss?
A. Correct.
Q. And we know that the last lender, which is American Portfolio, we know that they bought the loan for the full amount. And again, so we can assume that all the other lenders before them, whether it was two or four, got their money back, correct? So there's no loss?
A. I don't know if I can say that. I can assume that. But possibly. Seems logical.
Q. Now, American Portfolio buys this loan after default, after foreclosure. So they buy it knowing that it's already defaulted and been foreclosed on, correct?
A. I believe so.
Q. So, do you know, was there an appraisal done on the property at the time of the Sheriff's sale? Do we know what the house was worth at that point in time?
A. What -- the value of the house? I do not.
Q. So it could have gone up again. It could have been higher

than it was when Mr. Robers bought it. It could have been lower. We don't know. Is that safe to say?

A. The eventual -- I guess I would base that on the eventual sale of the property from the lender off to the Fraziers of $164,000.

Q. But this is a couple years down the road. I mean, this is in October of 2008 that the Fraziers --

A. Correct.

Q. And so again, based on your experience and knowledge of the real estate market, this is kind of after the bubble breaks, so-to-speak, right?

A. It was a later date and time, so --

Q. So again, safe to say -- and correct me if I'm wrong -- we don't know the difference between the value of -- or I'm sorry, we don't know the difference between the Sheriff's sale price and what the fair market value might have been in February of 2006?

A. Ultimately with the Sheriff's sale they chose not to sell that property, because no one would bid on that particular property to bring it up to the loan amount of $330,000.

Q. Well, correct me if I'm wrong. They don't have to sell it at a Sheriff's sale, right?

A. Correct.

Q. They can hold onto the property once they regain title, correct?

A. Correct.
Q. And they could, for example, try to see if it's going to appreciate. They could retain a commercial broker and try to sell it for a higher price?
A. Correct.
Q. So they make the decision, and it's common, in fact, for lenders to basically bid on the property and get it back at the Sheriff's sale?
A. Correct.
Q. And again, based on your knowledge and experience working in this area, isn't it common for lenders to do so, basically, to get the loan off their books? They just want to cut their losses and move on.
A. That would be up to the individual company, but it does occur, correct.
Q. Again -- right. But in your experience you've seen that happen relatively frequently, correct?
A. Correct.
Q. So in that case, in such a situation, the lender could try to sell the property for higher or do different things, but they're basically cutting their loss?
A. Correct.
Q. And, in fact, in reviewing the foreclosure documents, which you said you did at the loan office, did the lender in this case waive his right to a deficiency against Mr. Robers in the

foreclosure proceeding?
A. That I don't know.
Q. You don't recall?
A. I can't recall.
Q. Are you a certified appraiser?
A. No, I'm not.
Q. So you're not able to necessarily know what a house is worth at any given time, is that correct?
A. Correct.
Q. So when you testified earlier about there's nothing between the sale to Cerna and the sale to Robers justifying the $30,000 increase, you don't have expertise to necessarily confirm that, correct?
A. Correct.
Q. Now, as far as Exhibit 2, which is the Exhibit the Government submitted as far as what Walworth County assessed it at in 2004 -- again, your knowledge and experience, does the tax assessed value always equal the fair market value?
A. As far as the assessed value? The assessed value is 75 percent of what Walworth County is saying is the fair market value, essentially.
Q. So then even according to Walworth County the property is worth more than $206,000 at that point?
A. No.
Q. Or they're saying it's worth 150,000?

A. They're saying the value is worth $206,000.
Q. Okay. What's does the assessment ratio mean? What does that do?
A. Essentially 75 percent is the assessment ratio. That's the number that they multiply the fair market value by in order to come up with the assessed -- what they assessed it at.
Q. For tax purposes?
A. Correct.
Q. Again, my question is does a house always sell for what Walworth County assesses it for?
A. No.
Q. So the fair market value on the tax assessment does not necessarily equal the fair market value in real life when the property is going to be sold?
A. Correct.
Q. And again, there can be a wild variation depending on different factors, including the real estate market?
A. Correct.
Q. Do you know, when these loans are bought and sold for the different companies throughout this process, whether they're bought in packages? Or individually?
A. That I don't know.
Q. Do you know, again, when it's bought whether it's for prospective investment and they're bought to, you know, later re-package and sell it to another company down the road?

A. I don't know that.
Q. Do you know that each lender discloses to the next one that they're selling to that the loan is in default or in foreclosure?
A. I don't know if they disclose that or not, necessarily.
Q. And again, you don't know if the lender -- any given lender at any time is necessarily doing anything to mitigate the loss, or to try to sell the property at a higher value. You really don't know what the purpose is of these multiple sales of the loan, correct?
A. Correct.
Q. Now, I guess -- I have some questions about the other property, which I know Mr. Farmer testified to. But again, the same question here. You don't know what -- you know, potentially led to the difference between the ultimate sale price, and what they bought the loan for, is that correct?
A. Correct.

MR. DONOVAN: I have no further questions.

MS. KRAFT: I just have a couple of things as a point of clarification.

REDIRECT EXAMINATION

BY MS. KRAFT:

Q. I'm going to show you a document -- I don't have it marked as an Exhibit. I have some notes on it, which are my notes, so I just want you to look at the top portion of it. Tell me if

you recognize it.
A. Yes, I do.
Q. Tell me what you recognize it to be.
A. This would be a letter from Paul Kessell, the President of American Portfolio.
Q. Okay. And it's an E-mail, is that correct?
A. Correct.
Q. And have you seen that before today?
A. Yes, I have.
Q. And when you look at it can you tell me whether or not, after you reviewed it, it refreshes your recollection about whether or not there were multiple owners of the note between the original lender, M.I.T., and American Portfolio. Just read it to yourself. And then I want you to tell me whether or not it refreshes your recollection about that.
A. (Witness so responds.) Okay. I've been refreshed.
Q. Okay. Can you tell me whether or not, based on your review of that, you know was there anyone who owned the note in-between M.I.T., the original lender, and American Portfolio?
A. There was not.
Q. Can you tell me whether or not you are able to determine when it is that American Portfolio acquired the note from M.I.T.?
A. Yes.
Q. When?

A. December 29th, 2005.
Q. And was that before or after the foreclosure judgment?
A. That was before.
Q. And are you able to tell us for what price American Portfolio acquired the loan from the original lender, M.I.T.?
A. Yes, I am.
Q. And for what price was that?
A. $330,000.
Q. Which was the original amount of the mortgage, is that correct?
A. Correct.
Q. And are you also able to tell me what day the property was disposed of, according to Paul Kessell from American Portfolio?
A. Yes, I am.
Q. What date was that?
A. October 6th, 2008.
Q. And is that consistent with the public record search that you did with respect to that -- consistent with the sale of the property to the Fraziers?
A. Yes, it is.
Q. And can you tell me for what price Mr. Kessell indicated the property to have been sold?
A. $164,000.
Q. Which is also consistent with your public record search, is that correct?

A. Correct.

MS. KRAFT: That's all.

THE COURT: Any further questions?

RECROSS EXAMINATION

BY MR. DONOVAN:

Q. So I just want to be clear. So you refreshed your recollection based on the E-mail that you were just shown, that there were no other -- there were no other sales of the loan other than from M.I.T. to American Portfolio prior to the foreclosure, is that right?

A. Correct.

Q. So any other purchase or exchange of loan after the foreclosure and before the sale in October of 2008.

A. Correct.

Q. And again, you don't know if any of those lenders necessarily knew that the property was in foreclosure or not. We don't know what they were told, or why they bought it. Is that fair to say?

A. Correct.

MS. KRAFT: Isn't it true that there were no other purchasers?

THE WITNESS: Correct.

MR. DONOVAN:

Q. I'm sorry. I thought there was a South Star involved at some point. Do you know who that company is?

A. South Star is a subsidy of Merrill Lynch, we believe. And Merrill Lynch was the servicer.
Q. And the property was transferred to them, even though it was for a short amount of time, correct? I'm looking on the -- I guess fifth page of Exhibit 3. Conveyed to South Star on October 2nd, 2008.
A. My recollection, I believe that Merrill Lynch is acting as the servicer of that loan, not the actual owner of that loan.
Q. Right. But -- well, Merrill Lynch is listed as the grantor. So that means they would have been holding the property, right?
A. Not necessarily. I can't recall specifically if they were acting as a servicer or the owner of that property at that point.
Q. Well, could a servicer transfer the property?
A. Yes.
Q. On behalf of the person or the entity who actually owns it?
A. Correct.
Q. So you think that Merrill Lynch granted it from itself to South Star, and then South Star 4 days later then sold it to the Fraziers?
A. Correct.
Q. Do you know why South Star would have held it for four days?
A. Why they would have -- sorry, I don't know. No.
Q. And you don't know what they would have bought it for, or why they would have bought it, or why it would have been

conveyed to them?
A. Why the Fraziers bought it? I don't know.
Q. No, I'm sorry. Why would it have been conveyed to South Star? You don't know?
A. Why would it have been -- I'm sorry?
Q. Do you know why it would have been conveyed to South Star for 4 days?
A. Essentially as a quitclaim deed, it is my recollection that essentially they would transfer it over to them for some sort of administrative reason. But I don't know.
Q. Okay. I have no other questions.
MS. KRAFT: I have nothing else.
THE COURT: All right. You may step down, Agent Sheen. Thank you. Any additional testimony?
MS. KRAFT: That's all from the Government, Your Honor.
THE COURT: The Court will receive them.
MS. KRAFT: I'm sorry?
THE WITNESS: You offered the Exhibits, did you say?
MS. KRAFT: Yes. I'm sorry. I would offer Exhibit Number 1, 2, and 3. And I would like them made part of the record. I believe the Court has them all.
THE COURT: I do.
MR. DONOVAN: No objection.
THE COURT: Since we're talking about the original --

or the first, I should say, objection to the presentence report, which is Paragraph 19, and the amount of -- level increase because of the loss, is there any additional argument? We just heard testimony. Is there any additional argument on this particular issue?

MR. DONOVAN: Not from Mr. Robers.

MS. KRAFT: Paragraph 19 I think is -- I think he's correct. I think that there's a difference between -- I think -- okay. In calculating the guideline loss -- and I think that's different than the restitution loss -- I think that their guidelines envision the difference between the loan and the resale of the property. Not the amount of the loan and the -- I need to re-read this.

Right. I believe that in the original PSR, the PSR writer held Mr. Robers responsible for the full amount of the loan under the theory that he intended the entire loss of the $330,000. And I believe that the guidelines envision that the value of -- where property is involved, where there's collateral, that will be -- that the original loss will be mitigated, will be reduced by the value of the collateral.

And so in terms of the level of -- the increase in the guideline level, I think that the Court needs to consider the difference between the original note and the ultimate sale of the property, as opposed to the amount of the original notes.

Originally when I started doing these cases I took the

same position that the Probation Department has taken. I took the position that where somebody took a loan and never intended to pay it at all, they really intended that the entire loss of the note occur. Or the loan occur. But I think that ignores the fact that the property that secures it, the collateral, has some value.

So I think that with respect to Page 5, objection -- Paragraph 19, the Defendant is correct. And I think that the correct guideline calculation is that that we have basically agreed in the Plea Agreement, which I think actually was corrected. I think I started him out at 7, and really should start out at 6. But I think that's different from the restitution argument that we are having -- that we're having today. If that makes sense.

THE COURT: Well, it does. You're in effect agreeing with the defense on this objection.

MS. KRAFT: Yes. And I think I said that in my -- in my response that I wrote on November 1st. And again, I apologize for not being able to obtain -- to respond sooner on that one. I was out of town and didn't get back until October -- excuse me, November 1st, and filed my response on that day.

THE COURT: Then we have Paragraph 29, Page 6, which objects to the criminal history point. Any additional argument on that point?

MR. DONOVAN: Not from Mr. Robers.

MS. KRAFT: I think that it does count. I think it counts because even if it's an ordinance violation, if it's an offense that's also a State criminal crime, it counts. And so I don't have any specific independent knowledge about the underlying facts. But I think Ms. Vodak is correct in counting it towards his criminal history.

THE COURT: Well -- and the Court agrees with Probation on this, that the parallel offense on the State level according to the Guidelines would require that assessment. So the Court will overrule that objection. The Court would inquire as to whether or not there's going to be additional argument now relative to the restitution.

MS. KRAFT: I guess I would like to just -- to sort of summarize what we have here --

THE COURT: -- all right --

MS. KRAFT: -- and make some argument. In this case, the Government has sought restitution for the two properties in a different way. American Portfolio was the note holder. Purchased the note on December 29th of 2005, from M.I.T., which all the discovery material shows to have been the original lender. American Portfolio claimed a loss on the note. Indicated to Government counsel that the property was sold on October 6th of 2008 for $164,000. I believe that actually American Portfolio is entitled to more restitution than the

difference. The problem was when Mr. Boumenot was about to be sentenced, Mr. Kessell, after repeated promises to provide a breakdown of his other expenses, failed to do that. And ultimately in determining that we needed to finalize the Boumenot restitution order, this is the amount that we agreed on. The difference between the sale price, and the original loan. And so that amount exists in other judgments. I think it's really more than fair, because in reality I believe that the Defendant ought to be responsible for other costs beyond the $166,000 loss. But because we weren't able to get more definitive figures, that's what we were left with, and that's what we proposed to the Court, and that's what the Court accepted in Mr. Boumenot's case, and I think it's fair in Mr. Robers' case.

I don't understand this business of well, the real estate market is really the culprit for making the property decline. This was an inflated property. Just looking at the prior year's tax records it's pretty clear that there's no way that it was worth 300,000, let alone 330,000 at the time that the Defendant pretended that he was going to acquire this property for himself. It just wasn't a property that had that kind of value.

And what Agent -- well, actually I think what Mr. Farmer was saying, and maybe I asked Mr. Sheen this as well, what -- unfortunately what happens in these fraud cases,

particularly one like this where there's multiple properties that are sold at inflated prices in a particular area, it artificially inflates the entire area. And so to the extent that there was any legitimacy to these appraisals -- which I don't think there was -- but even if there was, it was the product of the other ongoing fraud that was occurring as a result of Mr. Lytle's conduct and those who were acting with him. I just don't think that there's any basis to say that Mr. Robers should be held responsible for something less than $166,000 on this loan.

The other -- the other property, 911 Grant Street, I made my legal analysis in the memorandum that I filed on Saturday. I think that -- I mean, I think it's not crystal clear as to what can be -- what are consequential damages, and what are direct damages of loss. Of a fraud loss. But I think that to the extent that the victim or the person who stands in the shoes of the victim is trying to mitigate those losses, is trying to prevent the property from losing value and trying to make the loss as small as possible, that those expenses that are incurred in the course of doing that really have to count. And I think that some of the more recent law on this area suggests that that's true.

I would suggest to you that -- to the Court that a consequential damage would be if the lender as a result of lending this didn't have money to make other loans. And so lost

business. That would be a consequential damage. But anything that flows directly from the fraud itself really ought to be compensable as restitution losses. And I think that it's really, really fair to hold the Defendant responsible for those losses that Mr. Farmer has claimed on behalf of M.G.I.C. that total $52,952.18.

He needn't have done anything, and the loss would have been $159,214.91, and then perhaps the property would have gone into decline and the City of Lake Geneva would have been stuck with it, and the taxpayers would have been stuck with a declining, decaying property, in a neighborhood that nobody was taking responsibility for. And that has happened a number of times in Milwaukee where lenders have just walked away from properties and left them to the neighborhoods and the cities to deal with.

I think that all the evidence in this case -- and again, it's by a preponderance of the evidence that the Government has to establish that these losses occurred. And that -- I think that I -- some of Mr. Donovan's questions were like well, Mr. Farmer, you didn't, you know, look at these numbers yourself. But he analyzed the file, looked at the business records that he had, and he came up with the -- I think reasonable loss claims in this case. And I think that we established sufficient evidence to support the $52,952.18 claim. So I would ask the Court to order total restitution, which

includes the 166,000, and the $52,952.18.

THE COURT: Okay. Mr. Donovan.

MR. DONOVAN: Thank you. And I will respond to the Government's arguments as far as what's a direct versus consequential loss. But I want to first begin by proposing that the Court impose a lesser amount of restitution regardless, pursuant to 18 U.S.C. 3664(h). And also United States vs. Sensmeier. And I'm not going to repeat my argument. I laid this out in my restitution memorandum. But this Court does have the discretion, which would be reviewed on appeal for an abuse of its discretion, to a portion, a lesser amount of restitution when there's more than one Defendant that's liable for the loss. And again, for the reasons I laid out in my memo, I feel that Mr. Robers should not be held responsible for the full amount of the restitution for two main reasons.

Number one, he is I think by all accounts, including the Government and the Probation Office, the least involved in this offense. It's clear that he had nothing to do with planning, or inventing, or executing, other than his limited involvement in this scheme. He was clearly approached, and he was approached by Bradley Hollister, who he worked for. And I think Bradley Hollister, when he approached Mr. Robers, knew this would be an individual that he could get to offer a small amount of money, and to act as a straw buyer.

Now, again, I'm not taking away from his

responsibility. We're not suggesting that he did not commit a crime. He did. He committed wire fraud. And he, you know, submitted false statements to the bank as to his income, and assets, and intent to occupy in order to get a loan. But it's clear that this -- you know, that he was convenient for the leaders of this scheme. And if it wouldn't have been Mr. Robers, it would have been somebody else. He was by no means integral to this scheme. I think at one point the Government in its PSR response said that he was integral. I think he's far from it. I think Mr. Robers was convenient. So his reduced culpability in this very small role in this offense I think would warrant apportioning him a smaller amount of the restitution than the others.

The other reason that the Court can consider a smaller amount for him is his economic circumstances. And Mr. Robers, as is made clear in the PSR, is a farmer. He helps around his father's farm. It's been in their family for generations. The PSR, paragraph 53, reports that Mr. Robers' positive monthly cash flow is $199. And I don't think that the Government would contest that. He has an H.S.E.D. I don't think that there's any realistic possibility that he's going to be getting a higher paying job in the near future.

He has expressed to me, and expressed to the presentence writer, that he wants to continue to run the family farm. He wants to keep it in the family when his Dad is no

longer able to handle it. And I think it's pretty clear that Mr. Robers will never be able to anywhere near pay a portion of, you, know, 200-some Thousand Dollars of restitution. And so I feel between his role in the offense, and between his economic resources, that this Court could, in its sound discretion, order a smaller amount. And the amount I propose is one half of his monthly take-home of $100 a month, over the course of 4 years of probation. So that would be about $4,800. This reflects an amount that's greater than what he profited from, and I think by all accounts he made at most $1,000. And the PSR reports that out of that $1,000 he used it to buy lawnmowers for a business that he wanted to start. So it's greater than that amount, but it also is much less than the overall amount and reflects his culpability, and reflects his economic resources.

Now, if the Court elects not to apportion the restitution, I do have issues with the methods and the theories proposed by the Government for why he should be on the hook for the full amount. The case law is very confusing on this. It's not clear. We know that restitution should only be made to cover direct losses, and not be made to cover consequential or incidental damages. That's one thing that I think the Seventh Circuit case law makes clear. They talk about how restitution is no synonym for common law damages. They talk about how it would complicate criminal sentencing unduly and unnecessarily because the victim, who has a shot at collecting common law

damages, can bring a tort suit. And that's exactly what's happened here. You know, this has complicated this sentencing and it's unnecessary, I think, to go through this. The fact is that these lenders did pursue civil process. They foreclosed -- the lender on Inlet Shores, foreclosed on the property. Got it back through a Sheriff's sale. They waived deficiency in that Sheriff's sale, if the Court would review the documents. But they're now trying to collect on their losses through Mr. Robers and other individuals. I don't think it's clear that his crime, committing wire fraud by false pretenses, for the purpose of executing a scheme is what led to the losses in this case. I think what led to the losses is the real estate market. The F.B.I. Agent testified that this was a booming market at the time. That the property values were up pretty much across the board. And so that if there is a decline in value, it could have been due to that. And I think that Mr. Farmer also testified to a similar extent. It's hard to say what causes the loss.

The Government talks about how, you know, these schemes artificially inflate prices in a geographic area. Well, back in 2004, 2005, up through 2008, every house price was artificially inflated across the board. And I don't think you can pinpoint again Mr. Robers' specific crime as the cause for this.

The Government also makes assertions that these were,

in fact, false appraisals. But in fact that's not borne out in discovery. And I think the F.B.I. Agent basically said on the stand the appraiser said that they were legitimate prices. The leaders of this scheme said that they were legitimate prices. And these statements were made in the context of a debrief, further admitting criminal liability. So I don't know why they would say that the appraisal's accurate, when it's really not. The Agent said that he's no expert himself in appraising how much a house is worth. I don't think tying this to the fair market value that Walworth County puts on it is a legitimate way to do it, because what houses sell for is not always what the fair market value is on the tax assessment. So I don't think that there is reliable information here, or enough reliability for the Court to make a decision that the loss was due purely to the wire fraud.

As far as the losses claimed by M.G.I.C., I really have issues with several line items on that. There is clear case law -- and I'm looking at one of the cases that the Government cited, the Arvanitis (phonetic) case, I believe, which does state clearly that attorney's fees aren't recoverable. So I think that line item is not legitimate.

I'm not clear on the property taxes and hazard insurance. I mean, that's something that the lenders elected to advance to keep the property from having, I guess, liens on it. I just feel that a lot of these line items submitted by M.G.I.C.

are consequential damages and not a direct cause by the fraud.

I also did review the Government's memorandum, since it was submitted on Saturday, and I feel a lot of the cases it relies upon supposedly for these propositions are very factually distinguishable from this particular case. United States vs. Shepard dealt with an interest bearing account that's not backed by collateral, as it was in this case. The Milwaukee vs. Cement Division of National Gypsum Company was a maritime collision case which, as far as I could tell, was an admiralty case that had nothing to do with criminal restitution. We have the Hosking case, which was an embezzlement case, where money was directly embezzled out of I believe investment accounts. We have the Adcock case, where -- this involved a Defendant who basically bilked the Government out of contracts -- the money the Government paid far exceeded the value of the services rendered. Again, no collateral involved. Then we have the Rhodes case, which dealt with stealing investors' money out of an investment account.

So I feel that a lot of the cases the Government relies upon to allow these consequential damages, they don't stand for these propositions and they're very factually distinguishable anyway from this case.

I think in this case, again, what the victims want is they want the Defendant on the hook for bad investment choices, and I think that they want to try to get them off the hook for

the declining real estate market, and for their decision how and when to dispose of the property. Which, again, in both cases was up to the lender once they reclaimed title through the foreclosure process.

So I think these are damages that should be recovered civilly, if at all. I don't think it's proper for criminal restitution, and I would ask the Court not to impose that amount, and impose the amount that I advanced in my memo.

I do also have other sentencing arguments, not related to restitution. I don't know if the Court wants to hear those now, or after the Court rules on restitution.

THE COURT: No, the Court has to rule on the restitution while we're discussing it. So we can take up the rest of the matters later. Anything else on this from the Government? Any other response from the Government to the first argument?

MS. KRAFT: Well, I -- you know, really would stand on the legal analysis that I made in my memorandum. But I guess just briefly in response to counsel, this was fraud. This was -- I mean, to attribute this to the falling real estate market ignores the fact that he signed mortgage loans. Promised to pay mortgage notes on properties that he never intended to own, and didn't ever make a single payment. He contributed to this fraud as much as anybody else. Yes, he had a smaller part in the overall aspect of it, but it was still fraud. If he

hadn't done that, he wouldn't be here today facing the music for these offenses. He's lucky that there was collateral involved, because the collateral, to the degree it has value, reduces the amount that he was responsible for in these transactions that he never intended to make good on. And I just don't see how you can argue -- how counsel can argue that somehow he shouldn't be responsible for making any restitution to these lenders. That, in fact, if they want to go after him civilly, they should go ahead and have at him. But that he doesn't have any criminal liability for the restitution.

I would ask the Court to order the restitution in the amount that's been requested, the 166,000 for American Portfolio, the $52,952.18 to M.G.I.C., for a total of $218,952.18. I think it should be joint and severally responsible. I recognize that he didn't have the -- necessarily the same role that the other actors did, but nonetheless I think that the Statute calls for him to be made fully responsible, and he should be.

THE COURT: All right. Anything else on this?

MR. DONOVAN: No, Your Honor.

THE COURT: Well, the Court has to look at -- I'm going to start out with the remarks -- start off with the first argument first, that the Defendant was a lesser participant, least involved, et cetera. And, therefore, should not be responsible for these amount of losses. But the Defendant is

responsible for the two properties that we're talking about, the Grant Street property, and the Inlet Shores property. And so that's what we're dealing with. And those are the amounts that we have to attribute to the Defendant. Without his participation, these properties wouldn't have been sold to these victims in the fashion that they were. Or those victims wouldn't have been involved in the fashion that they were as far as being lenders. And in the case of M.G.I.C., Mortgage Guarantee Insurance Corporation, guarantors of lenders' defaults. So the Court is not going to accept that. And also, the Court has never made an exception for economic circumstances. I've sentenced inner city bank robbers who have never made a dime in their life, and still are ordered to pay restitution in an amount that will probably never be repaid. But that was the right of the victim under the act, and the Court imposed that obligation upon those types of Defendants. And that was in spite of their economic circumstances.

Now, as to the exact amounts here, pick up with the same thing I started out with relative to the first Defendant's argument. The Defendant is being held responsible for two properties. Those are the Inlet Shores property, and the Grant Street property. We had the original appraisal at 330,000, and 141,000, and we wind up after -- as the Court has found from the testimony of Mr. Farmer, the processes that were involved, that resulted in a loss ultimately of 52 thousand-something dollars

because of the various -- and the Court will get to these -- the various expenses incurred, and then the sales price ultimately that it brought, and then brokers' commissions and all of that.

The argument is made that -- and I'll take up the M.G.I.C. case first because it involves the issue of consequential and direct damages and those other factors that the Court has to take into account according to the Seventh Circuit case law. But the Seventh Circuit -- the Court has just made a ruling on this case in the savings and loan fraud case in which the Court awarded damages for investigation done by -- and the audits that were -- costs involved in investigating and auditing the losses and the processes that went on after the bank frauds were discovered. And the Court cited the recent case of United States vs. Hosking. And I think that the Hosking case is indicative of -- although the case law is not, as Mr. Donovan has argued, really direct. It's somewhat confusing between what are direct and consequential damages. And a variety of cases involving a variety of facts, involve different results, by different Courts, different panels. The trend is, I think -- and the thrust of Seventh Circuit case law, and the thread that runs is becoming stronger in this fabric, is that these expenses aren't going to be considered as consequential. Or, rather, as opposed to consequential or direct. They're going to be called related offenses. And it's built into the logic of this situation. As the Government has argued, these

are fraud cases. It was a fraud that was perpetrated, which resulted in all of these actions that had to be taken but for the fraud. And that it's not putting a person, a victim in this type of case, in a better place. It's putting a victim back where that victim never should have gone and never would have been but for the conduct that was conducted by the Defendant.

And there's no doubt that the market went down this past number of years. And we all know that that market was inflated. The market was inflated because in large measure not only -- and I'm not going to get into macroeconomic arguments here, but because of the availability of money. But even with the easy availability of money, and the -- call them negligent lending practices -- a lot of it was involved with -- as we see with Countrywide. And Countrywide indeed and in fact was the servicer of the M.G.I.C. property, as the Court recalls. There was a lot of direct fraud as was perpetrated here. And I think that outweighed any initial risk assessments, any negligent risk assessments that were gone on here. It was just easy pickings for people who just decided to take those easy pickings. And the appraisals that were done were inflated appraisals. There's no doubt about it. I accept the argument made by the Government that inflated appraisals lead to inflated comparables because of the nature of the process. They also have appraisers who, while not being criminal in orientation, are more than willing with easy money to neglect their duty and give the appraisal that the

mortgage broker is asking for. And I deem it to be the case in this case, as I deemed it to be in the Bradley Hollister case. And Judge Adelman has come to the same conclusion, calculating those amounts in these different or other properties. But calculating the amounts and not accepting the positions that are argued here today.

So consistent with the logic of it, I think the logic is overwhelming. That the fraud was committed. The victim is owed, and he's owed the direct expenses -- I'll call them the direct expenses that flow from the fraud that would not have existed or not there -- never would have been there.

The market argument, as the Court has indicated, was dealt with in this manner as already indicated. And that is that the Defendant was part of that process that led to -- in large measure, to an inflated market. Even if that isn't the case, if we had -- never had a sale, we never had the fraudulent conduct, we may still have the property at 900 Inlet Shores or 911 Grant Street that would be undervalued, maybe under water, but there never would have been a foreclosure because the party responsible, the honest party responsible -- and indeed in this one case we had a person who probably could have held this property. I forgot which one it was. Involving the fellow who didn't even know he purchased the property. I guess that was the Jesus case, or Cerna case, or whatever. But the Court finds that the victims in this case, M.G.I.C., and the American

Portfolio -- I think that's Tom Dallman, is entitled to the amounts that are requested. And so the Court is going to set the restitution amount at $218,000 and whatever else it worked out to. Was it 952.18 or something like that?

MS. VODAK: Yes, sir.

THE COURT: Now the Court will listen to arguments as to whether or not I should send Mr. Robers to jail, or place him on probation, or whatever. And the Court will listen to the Government first as to its recommendation, and then the defense. Is the Government going to make a recommendation here?

MS. KRAFT: I am, Judge. And I agreed in the Plea Agreement, and I think it's appropriate, that I would recommend that Mr. Robers be put on probation. I think it's particularly fair that the Court consider that option. I realize that the guidelines call for a sentence of 12 to 18 months, but quite frankly, Bradley Hollister, who was involved in this scheme, who was involved with other properties besides those that the Defendant was involved in, and who was involved with one of the properties that the Defendant was involved with, was sentenced to a term of probation.

Now, I recognize that he was a cooperator, and that's the reason that I recommended that sentence for him, but I also can tell the Court that others who were similarly situated to Mr. Robers have received probation terms. I don't think that he has -- this was a serious offense. I don't in any way, or

shape, or form, mean to suggest that it wasn't. And that I don't take very seriously the fact that he was an integral part of this fraud scheme. But I think that overall, given his role in the offense, and I think overall given his background, that it's unlikely that he's going to become involved in offenses like this in the future.

I also think it's important for him to be working, to be contributing to the restitution that is due in this case. And so I would, consistent with my promise in the Plea Agreement, recommend that he be placed on probation for a lengthy period of time, actually, so that he can work towards making that restitution.

THE COURT: All right. Mr. Donovan.

MR. DONOVAN: Thank you, Judge. I believe I already covered what my view is of his role in the offense when we talked about restitution. I agree that probation would be appropriate. He was very minimally involved, at least compared to the other participants. I think the Court touched upon the fact, too, that these were at least negligent lending practices, if not questionable themselves. So I think this is -- needs to be evaluated in the context of the market as a whole back at this time. Now, again, it doesn't excuse his actions. He did commit a fraud. He's pled guilty. He's not backing away from, you know, accepting responsibility in this case.

He otherwise has good character. I think he's

otherwise a good citizen of Wisconsin. I think this was very much out of line for him, and I think this has been proven since the crime occurred. I mean, this was 5 years ago. This was June of 2005. And since then Mr. Robers has obviously not had any other crimes, has not had any other conviction or encounter with law enforcement.

I talked already about his family farm. He still is working on the farm with his father, who is here in court today, to be a source of support for him. I think he wants to say a few words briefly.

Other than working at a ski lift and also working as a lawn mower, he's never done anything else, really, since about the age of 12 or 13. And he, again, has no plans to do so. So he's going to keep working on the farm and keep it in the family as long as he can, and continue to help his Dad.

He's 25 years old. He has no children. He's single. He does have good family support through his mother and father, who he lives with on the farm. Again, very little criminal history. The criminal history he does have is related solely to marijuana use as a teenager. There was never any incarceration imposed. I believe both of the offenses were for fines and they've been paid, his full fine amount.

He did, like I mentioned, earn his G.E.D. after missing the end of high school. He missed that because his father was injured and so he helped to take over the farm. He

continued to run it and so he missed out graduating with his classmates. But he did eventually get his H.S.E.D. education. He basically in his free time, other than just working on the farm, he just enjoys time with his friends and family. He does enjoy, I believe, fishing and some outdoors activities.

I think it's clear he's not a threat to the community. I think it's clear that he's not going to commit further crimes anywhere in the future. He's otherwise a productive, tax paying citizen, who basically keeps to himself and keeps to tending the farm. And again, he was involved in this offense only because he was approached, and his involvement was limited. So I would ask the Court to impose probation with any other conditions it sees fit. And like I say, I think his Dad would like to say a few words on his behalf.

THE COURT: All right. State your name, sir, and then spell it for the purposes of the Court Reporter.

THE WITNESS: Steven J. Robers, R-O-B-E-R-S. We farm south of Burlington. The farm's been in the family since 1884. And Ben has been a part of the operation. He's a good kid. He hasn't really ever been in a whole lot of trouble, compared to a lot of kids that he's been around. Basically he's a good kid that tries to keep his nose clean. And this was just one of those unfortunate things where greed probably -- by other people happened to enter into this and, you know, he got caught up in something that definitely he shouldn't have gotten caught up in.

And, in fact, we didn't even know about it until probably a year after it had happened. So thank you.

THE COURT: You're welcome. All right. Benjamin, you have a right to speak. Is there anything that you want to say before I pass sentence on you?

THE DEFENDANT: Just that I'd like to be able to keep running the family farm and keep basically doing what I'm doing. Staying out of trouble, which I have since this all came down on me. And like to keep running the farm, you know. That's really about all I have to say.

THE COURT: That's it?

THE DEFENDANT: Yes.

THE COURT: Well, as counsels are aware -- and the Court will put on the record -- the Court has to consider a variety of factors in any sentencing. The guidelines call for a sentence, as indicated, of imprisonment. The Court has to then take the sentencing guidelines, which represent over two decades of sentencing wisdom, and then integrate that into the factors under 18 United States Code Section 3553, which are the same factors that the guidelines contain. And that is to look at the nature and circumstances of the offense, the history and characteristics of the Defendant, and then to render a sentence not more than necessary to achieve the same objectives that they both have, such as it has to reflect the seriousness of the offense, promote respect for the law, create a just punishment,

provide adequate deterrence, protect the public from further crimes, and take into account any needs of the Defendant, if those are relevant.

Now, relative to the first standard, the nature and circumstances of the offense, the Court touched on this not only in the other sentencings, particularly the Bradley Hollister sentence that it did, but other sentencings that it did during the restitution argument, that this is a serious offense because it involved an action that was part of a larger -- much, much larger process. We talked about Countrywide here. We know that the President of Countrywide, Angelo Ansillo (phonetic), is now under investigation because of sweetheart deals he made with Senators on the Senate Banking Committee and other matters like that, that may not be directly related, but he's certainly under investigation by the S.E.C. And they're waiting for the other shoe to drop relative to criminal indictment, as the Court understands that process. And so you've got Countrywide involved, and there was not -- they were not alone in this.

And the Court has mentioned easy money, and the people that -- who did not have the right moral and ethical outlook took full advantage of it. The Court has seen many of these cases here in its own District where we have people who couldn't afford houses owning 5 or 6 houses, and then bleeding those houses dry. Now you, Mr. Robers, were not a part of that. I will accept the fact, and the Government has accepted it, too,

that people came along, offered you some easy money. All you had to do was sign your name. But nonetheless, you became part of that larger process. But while the specific fraud is in the general analysis, as the Court has just conducted, a serious one, yours is not that serious, in relation to it. Not to diminish it, as your attorney Mr. Donovan has indicated. He's not -- not meaning to diminish this.

Then I look at the history and characteristics of the Defendant. Everybody that sits before me is unique. Every individual is unique. Everybody has a profile. Everybody has to be looked at by a Judge in that way to see whether or not there are positives and negatives in that profile to determine the sentence. Coupled, of course, with the severity of the offense. And I look at you. And you've got a lot of positives here. You're apparently hard working. Your Dad has just said that. That you're basically a good kid. Mr. Donovan says you've been a prosocial person in your orientation. That you haven't been a threat to the community. Been a good citizen. Although, you know, you've been using -- according to this presentence report -- marijuana at an early age. And started at 16. And were using, according to what the presentence writer tells me here, and what you told her, about two bowls a day. It's a significant amount of marijuana. And people always come in here and say Judge, well, you know, all he does is use a little marijuana. I could go on and on for a long time about

how that little bit of marijuana use, when coupled with other little marijuana uses, in various parts of the city, the country, whatever, adds up to a big huge criminal enterprise. They're talking about legalizing marijuana in California. Do it for medical purposes. Although that proposition was defeated in California to legalize it and expand it further. But the point is, it's still against the law. And when you use marijuana, you're part of a transaction which involves the sale of marijuana. Because I know people aren't giving it to you. And I sure hope it's not being grown on the farm. I don't think it is, but there are people who grow marijuana on farms here in Wisconsin. But -- so that's not being a good citizen. But it's also, from another viewpoint, not good for you because marijuana blunts your -- when you start using it in your formative years, in your teen years -- I've said this many times -- it blunts the neurons in your brain. It destroys the synapses in the brain so that it doesn't really function the way it should. In other words, you're a better person without marijuana. And when the brain is forming, it's even worse. Because it distorts it. This may have led to your casual attitude towards Bradley Hollister or anyone like that coming up and saying hey, Benjamin, do you want to make some easy money? It's not a big deal. But if you don't think that your smoking marijuana and violating the law in that respect is no big deal, why, you're probably going to think that something like that is no big deal,

either. And then, of course, you wind up in trouble, right?

THE DEFENDANT: Yes.

THE COURT: Just like you wound up at age 17 and 19. Possession of drug paraphernalia and T.H.C. back then. Those two cases. And maybe -- you know, in Malaysia they don't have a drug problem. But they beat people who smoke marijuana. And they kill people who deal. And they don't have a drug problem. But we've got an Eighth Amendment here. Can't do that. Shouldn't do that. It's cruel and unusual punishment. The point is, we rely upon free Americans to make those decisions for themselves, and respect the laws. As Lincoln said, you shouldn't violate the law, in the least particular. Because these laws that we have, Government of the people, by the people, are paid for at a high price.

Well, you are basically a very positive -- you've got a very supportive Dad. You know, your family has been in -- your family farm's been there for 126 years. You're part of a diminishing breed. Try to keep that alive. That's -- it's something that's worth keeping. It's hard work, and it's wholesome work, and you should view it that way and live the rest of your life with that attitude and with that vision.

So I'm going to put you on probation for 3 years. And I'm going to -- and this is an equitable sentence. It's a uniform sentence. Bradley Hollister would have gone to jail except, as you heard the prosecutor here, that he cooperated.

And that cooperation as presented to me by the Government was one which merited a probationary sentence. But this sentence is a fair one in connection with your case. So that's what I'm going to do.

I'm going to set conditions of probation. You also had the restitution amount. That's made a part of it. You cannot commit any State, Federal, or local crimes. I know this presentence report says that you've been off the marijuana, off the Mary Jane. And that's got to continue, because if you come back, that will result in the revocation of your probation. You understand that. Right, Benjamin?

THE DEFENDANT: Yes.

THE COURT: And, you know, there's a reason we call marijuana users dead heads and potheads. Because if you keep on using that stuff, that's the way you become. I mean, nothing good comes from that, right?

THE DEFENDANT: Yes, sir.

THE COURT: You have to cooperate with the supervising Probation Officer, providing that supervising Probation Officer with a D.N.A. sample. You have to obviously, as I said, refrain from the use of any controlled substances. Not only marijuana. Participate in a program of testing to include -- well, not more than six urinalyses tests per month. And residential or outpatient treatment for drug or alcohol abuse. But that's only if the Probation -- that's at the discretion of the supervising

Probation Officer.

Pay the restitution off at a rate of no less than $100 a month. File any and all income tax returns in a timely manner. Not open up any new lines of credit, or use existing credit without previous approval of the supervising Probation Officer. Provide any and all financial information to the supervising Probation Officer. And pay the $100 mandatory special assessment that the Court -- that the Court indicated at the time of your plea that you were responsible for under the mandatory Victim Restitution Act. Did I mention D.N.A. sample? I did?

MS. VODAK: Yes, Your Honor.

THE COURT: Okay. The Court having rendered its disposition, is there any question as to the Court's disposition from the Government?

MS. KRAFT: No. Only I would like to say that with respect to the 911 Grant restitution, it should be joint and several with James Lytle, Martin Valadez, Bradley Hollister, and Eric Meinel.

THE COURT: Yes.

MS. KRAFT: And the 900 Inlet Shores should be joint and several with James Lytle, Martin Valadez, John Boumenot, and Jose Valadez.

THE COURT: Yes.

MS. KRAFT: And their judgments reflect the same.

THE COURT: Yes. Okay. Joint and several. Mr. Donovan, any questions?

MR. DONOVAN: No, Your Honor.

THE COURT: Mr. Robers, do you have any questions about what the Court did here today?

THE DEFENDANT: No.

THE COURT: Then I have to advise you of your appeal rights. You have 14 days to appeal this case. If you can't afford an appeal, a notice will be filed on your behalf by the Clerk of Courts. And Mr. Donovan, you will file a Notice of Appeal on Mr. Robers' behalf if he decides to do that?

MR. DONOVAN: Yes.

THE COURT: Anything else to come before the Court on this case?

MS. KRAFT: Not from the Government, Your Honor.

MR. DONOVAN: No.

THE COURT: The Court will stand in recess. Good luck to you, Mr. Robers.

* * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

I, HEIDI J. TRAPP, Official Court Reporter for the United States District Court, Eastern District of Wisconsin, do hereby certify that I reported the foregoing Transcript of Proceedings; that the same is true and correct as reflected by my original machine shorthand notes taken at said time and place before the Hon. Rudolph T. Randa.

_____

Official Court Reporter
United States District Court

Dated at Milwaukee, Wisconsin,
this 17th day of December, 2010.

OPPOSITION BRIEF

ORIGINAL

No. 12-9012

Supreme Court, U.S.
FILED
JUN - 3 2013
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN ROBERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

MYTHILI RAMAN
Assistant Attorney General

KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

When the victim of a crime is entitled to restitution for the loss of property and return of the property is "impossible, impracticable, or inadequate," 18 U.S.C. 3663A(b)(1)(B) provides that a defendant shall pay "an amount equal to (i) the greater of * * * (I) the value of the property on the date of the damage, loss, or destruction; or (II) the value of the property on the date of sentencing, less (ii) the value (as of the date the property is returned) of any part of the property that is returned." The question presented is:

Whether the district court plainly erred in calculating a restitution award for victims who lost cash because of the defendant's loan fraud when the court reduced the victims' losses by the amount they recouped from the sale of the collateral securing the loans.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 698 F.3d 937.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2012. A petition for rehearing was denied on November 28, 2012 (Pet. App. 46a). The petition for a writ of certiorari was filed on February 26, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of conspiracy to commit wire fraud, in violation of 18 U.S.C. 371. He was sentenced to three years of probation and ordered to pay $218,952.18 in restitution. The court of appeals vacated the portion of the restitution award reflecting attorneys' fees and certain "expenses" but otherwise affirmed the sentence. Pet. App. 1a-44a.

1. Petitioner participated in a mortgage-fraud scheme in which a number of co-conspirators obtained "consulting fees" by arranging for "straw buyers" to obtain loans. Pet. App. 4a-5a; PSR para. 8. Petitioner was one of those straw buyers. He signed fraudulent loan applications for two properties in Walworth County, Wisconsin: 900 Inlet Shores and 911 Grant Street. Pet. App. 5a; PSR para. 10. Petitioner "falsely stated that he would use the houses as his primary residence and that he would pay the notes secured by the mortgages on the houses; he also provided false and inflated information concerning his income and assets." Pet. App. 5a. Based on the false information, lenders approved the mortgages and wired funds to settlement companies that closed the loans. Ibid. When petitioner defaulted, the lenders (or their successors

in interest) foreclosed on the loans and ultimately resold the houses that had served as collateral. Ibid.

2. Petitioner pleaded guilty to an information charging him with conspiracy to commit wire fraud, in violation of 18 U.S.C. 371. Pet. App. 5a. The district court imposed a below-guidelines sentence of three years of probation. Id. at 7a. The court also ordered payment of $218,952.18 in restitution -- $166,000 to American Portfolio and $52,952.18 to Mortgage Guaranty Insurance Corporation (MGIC) -- pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA or Act), 18 U.S.C. 3663A. Pet. App. 7a; see ibid. (noting that petitioner and the other conspirators involved in the fraudulent scheme were jointly and severally liable for payment of that amount).[1]

The MVRA provides that "the court shall order" defendants guilty of certain crimes to "make restitution to the victim of the offense." 18 U.S.C. 3663A(a) and (c). It also provides that if the offense results in "loss * * * of property of a victim" then "[t]he order of restitution shall require that such defendant * * * return the property to the owner of the property" -- unless return "is impossible, impracticable, or

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[1] In the plea agreement, petitioner agreed "to pay restitution as ordered by the court" and "to cooperate in efforts to collect the restitution obligation." 2:10-cr-00095 Docket entry No. (Docket entry No.) 2, at 9-10 (E.D. Wis.).

inadequate." 18 U.S.C. 3663A(b). In that circumstance, the defendant must instead be ordered to "pay an amount equal to":

> (i) the greater of--
> (I) the value of the property on the date of the damage, loss, or destruction; or
> (II) the value of the property on the date of sentencing, less
> (ii) the value (as of the date the property is returned) of any part of the property that is returned.

18 U.S.C. 3663A(b)(1)(B).

To support a restitution award, the government presented evidence about the amount of money lost by victims as a result of petitioner's fraud. With respect to the Inlet Shores loan, an FBI agent testified that before petitioner's default American Portfolio bought the mortgage note for $330,000 (the original amount of the loan) and eventually was able to sell the collateral for $164,000, resulting in a loss of $166,000. Pet. App. 7a. With respect to the Grant Street loan, a representative of MGIC testified that the mortgage was owned by Fannie Mae (which had acquired it from the original lender) and insured by MGIC, and that MGIC had faced a choice between paying a percentage of a $159,214.91 claim by Fannie Mae or paying the full amount of the claim and acquiring the property. Id. at 6a. MGIC chose to pay the full amount; ultimately, it reduced its loss to $52,952.18 by selling the property. Ibid.; see ibid. (explaining that MGIC's loss was "lower

than the amount it would have had to pay had it paid a percentage of Fannie Mae's claim"); Gov't C.A. Br. 6-7.

Having considered that evidence, the district court concluded that the victims should receive restitution under the MVRA for the full amount of their losses. Petitioner argued that the court should not order him to reimburse the full amount because he played only a minor role in the offense and could not afford to pay more than a few thousand dollars. Objection to PSR 2-3; Docket entry No. 11, at 1-4. He also argued generally that he should not be held responsible for changes in the value of the houses, suggesting that the victims' losses may have been due to their "rush" to sell the properties or to "the housing market itself." Docket entry No. 11, at 7. The district court ruled, however, that petitioner was fully responsible for the losses (on a joint and several basis), since "[w]ithout [petitioner's] participation, these properties wouldn't have been sold to these victims in the fashion that they were." Pet. App. 123a-124a.

2. The court of appeals affirmed the district court's ruling on the proper method for calculating the restitution award (and, in large part, affirmed the award itself).[2] The court rejected

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[2] The court vacated two "line-item[s]" in the restitution award -- for attorneys' fees and "other expenses" -- because it lacked "sufficient detail to know" whether they were "recoverable." Pet. App. 39a.

petitioner's argument -- raised for the first time on appeal -- that Section 3663A(b)(1)(B)(ii) required the district court to offset the victims' losses by the value of the collateral at the time the victims took title to the houses rather than by the amount of money the victims recouped when they later sold those houses. Pet. App. 10a ("[W]e hold that in calculating a restitution award where, as in this case, cash is the property taken, the restitution amount is reduced by the eventual cash proceeds recouped once any collateral securing the debt is sold.").

In so interpreting the MVRA, the court focused on the consistent use of "the property" in Section 3663A(b)(1) -- including in the subsection permitting offset if "any part of the property * * * is returned," 18 U.S.C. 3663A(b)(1)(B)(ii) -- to mean "the property stolen." Pet. App. 10a-12a. The court explained that possession of the collateral did not matter for purposes of determining the offset: "[i]n this case, since the property taken from the victims was cash, the two houses purchased with the cash were not the property taken from the lenders, but rather were collateral that secured the cash loans." Id. at 11a. Because cash is liquid and real estate is not, "[t]he two cannot be equated." Ibid.

The court of appeals also rejected petitioner's argument that the district court's ruling "makes him the insurer of real estate

values and improperly holds him responsible for declines in the real estate market." Pet. App. 13a. As the court of appeals explained, petitioner's fraud "actually" caused the losses because, "[a]bsent [petitioner's] fraudulent loan applications, the victim lenders would not have loaned the money in the first place," the mortgage notes "would not have been extended, not paid, and then defaulted upon," and "the banks would not have had to foreclose on and then resell the real estate in a declining market at a greatly reduced value." Id. at 13a-14a. If petitioner were allowed an offset greater than the amount the victims realized at the resales, the court concluded, the victims would not be fully compensated for the losses that petitioner caused. Id. at 10a-12a.

The court of appeals noted that the circuits were divided and that some other decisions had reached a different conclusion about how to apply Section 3663A(b)(1)(B) in the case of a fraudulent loan secured by collateral. Pet. App. 20a-37a. But the court explained that those decisions did not consider the meaning of the statutory references to "the property" and "ignored the fact that" the collateral "was not the property stolen." Id. at 23a.

ARGUMENT

Petitioner contends (Pet. 11-14) that the district court erred by failing to offset the victims' losses by the value of the collateral securing the loans at the time the victims took control

of it. The court of appeals correctly held that the district court's valuation method was proper under the MVRA. Although some division exists in the courts of appeals on whether "property is returned" under Section 3663A(b)(1)(B)(ii) when title to collateral is transferred to the victim, that division does not warrant this Court's review at this time, and this petition would in any event be an inappropriate vehicle to resolve it given petitioner's inability to make a showing of reversible plain error.

1. Congress enacted the MVRA to make restitution mandatory for all victims of specified crimes, without regard to the defendant's ability to pay. See S. Rep. No. 179, 104th Cong., 1st Sess. 18-21 (1995). Under the MVRA, the district court "shall order * * * that the defendant make restitution to the victim of [a specified] offense" in "the full amount of each victim's losses." 18 U.S.C. 3663A(a)(1) and (c)(1)(A)(ii), 3664(f)(1)(A). Thus, if a victim has suffered the "loss * * * of property," then the defendant must return "the property" to its owner -- and when "return of the property" is not possible or adequately compensatory, the defendant must pay "the value of the property" less "the value * * * of any part of the property that is returned." 18 U.S.C. 3663A(b)(1)(B); see ibid. (stating that the value of the offset should be calculated "as of the date the property is returned").

As the court of appeals explained, in the case of a fraudulent loan, "the property" that has been stolen from the victim is cash, not the collateral used as security for the loan. Pet. App. 10a-12a. Thus, when the victim takes title to the collateral, "the property" that was stolen has not been "returned" to the victim. 18 U.S.C. 3663A(b)(1)(B). Rather, the victim has received something else altogether - an illiquid asset that takes time and effort to convert into liquid funds. Thus, while the collateral may possess have monetary value, it is only when the collateral is sold for cash that "return[]" of any "part of the property" the victim lost has been effectively accomplished. Ibid.; see Pet. App. 12a (explaining that "[a] house is not part of the cash" and therefore is not "part of the property").

Petitioner's contrary interpretation (Pet. 11-14) is inconsistent with the plain text of the statute. Section 3663A(b)(1) first states that it covers offenses "resulting in * * * loss or destruction of property of a victim of the offense," and then repeatedly uses the phrase "the property" to refer back to the property that the victim has lost. 18 U.S.C. 3663A(b)(1); see Pet. App. 11a (explaining that "the property" as used in the relevant provision always "means 'the property stolen'"); cf. Work v. McAlester-Edwards Co., 262 U.S. 200, 208 (1923) (stating that if a statute did not mean to refer to a

specific appraisement, "the language would not have been 'the' appraisement but 'an' appraisement") (emphases removed). Under petitioner's preferred approach, however, "the property" would suddenly take on a different meaning in the subsection on offset, becoming a reference to the collateral that secured the lost property. No reason exists why Congress would have intended "identical words used in different parts of the same act" to have such different meanings. Sorenson v. Secretary of Treasury, 475 U.S. 851, 860 (1986) (citation omitted).[3]

Petitioner's approach is also inconsistent with the clear purpose of the MVRA to compensate victims for the "full amount" of their loss. 18 U.S.C. 3664(f)(1)(A); see Dolan v. United States, 130 S. Ct. 2533, 2539 (2010) (stating that the purpose of the MVRA is "to assure that victims of a crime receive full restitution"); Hughey v. United States, 495 U.S. 411, 416 (1990) (the "meaning of 'restitution' is restoring someone to a position he occupied before a particular event"); United States v. Gordon, 393 F.3d 1044, 1053 (9th Cir. 2004) (explaining that the purpose of the MVRA is "to make victims of crime whole, to fully compensate these victims for

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[3] That conclusion is reinforced by the specific reference to "in-kind payments" in other sections of the MVRA, see 18 U.S.C. 3664(f)(3)(A), 3664(f)(4), which demonstrates that Congress knew how to provide for restitution involving property different from the property stolen. See Russello v. United States, 464 U.S. 16, 23 (1983).

their losses and to restore these victims to their original state of well-being") (citation omitted), cert. denied, 546 U.S. 957 (2005); 18 U.S.C. 3663A(b)(1)(B) (specifying that in determining the value of the property stolen the "greater of" two possible values should be used). As the court of appeals observed, title to the collateral is not equivalent to the return of cash. Pet. App. 10a-12a. The corporate entities who were victims in this case could not live in the residential real estate to which they took title when petitioner defaulted; the only purpose of gaining ownership of that real property was to sell it to try to recoup the cash they lost as a result of petitioner's fraud. But "real property is not liquid and, absent a huge price discount, cannot be sold immediately." Id. at 24a; see United States v. Boccagna, 450 F.3d 107, 116 (2d Cir. 2006) (recognizing that "in some circumstances, the 'market' for recouped property may be poorly developed or non-existent"). Accordingly, if a restitution award is subject to an offset based on a valuation of the real property as of the date of title transfer, then the victims quite possibly "would not be made whole again," because "the eventual sales proceeds could be, as they were in this case, woefully inadequate to fully compensate the victims for their loss and to put them in

the position they would have been absent the fraud." Pet. App. 13a.[4]

Petitioner contends (Pet. 13) that assessing the value of the collateral as of the date of the sale holds him responsible for a decline in value that he did not proximately cause. The court of appeals correctly rejected that argument. See Pet. App. 13a-16a. As the court explained, "[t]he declining market only became an issue because of [petitioner's] fraud," and the causal connection between the fraud and the victims' loss was therefore a tight one. Id. at 14a; see id. at 40a ("The victim is owed * * * direct expenses that flow from the fraud that would not have existed or * * * never would have been there."); id. at 44a ("[R]eduction in value of the real estate is a risk that falls on [petitioner], the one who defrauded the victims. The loss * * * [was] directly caused by [petitioner's] fraud."); United States v. Yeung, 672 F.3d 594, 603 n.5 (9th Cir. 2012) ("Yeung created the circumstances under which the harm or loss

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[4] In addition, a valuation is just an estimate, and it may well fail to reflect a property's true worth. See Pet. App. 126a (accepting that a valuation may be compromised if the value of other properties in the area has been affected by the fraudulent scheme giving rise to the restitution obligation); United States v. James, 564 F.3d 1237, 1246 (10th Cir. 2009) (explaining that basing value on an assessment would be "an approximate value of the property" and would not "as closely represent[] the calculation of actual loss").

occurred through her use of false information that induced the Long Beach Trust to purchase the loan. Because the Long Beach Trust's loss is directly related to Yeung's offense, the declining value of the real estate collateral, even if attributable to general financial conditions, does not disrupt the causal chain, and the victims of the fraud are entitled to restitution.") (citation omitted).

Petitioner's approach would create serious anomalies. If the value of collateral increases between the time the victim takes title to it and the time the victim sells it, then the defendant should be entitled to an offset based on the higher sale value. Pet. App. 15a. Otherwise, the victim would be awarded restitution in an amount greater than the actual loss resulting from the defendant's crime, which is impermissible. Ibid. (citing, e.g., United States v. Smith, 156 F.3d 1046, 1057 (10th Cir. 1998) ("[A] district court may not order restitution in an amount that exceeds the loss caused by the defendant's conduct. Such a restitution order would amount to an illegal sentence.") (citations and internal quotation marks omitted), cert. denied, 525 U.S. 1090 (1999)). But petitioner's preferred interpretation of the MVRA, under which the statute would mandate use of the collateral's value as of the title-transfer date, would dictate the opposite result. See id. at 15a-16a (explaining that the MVRA cannot be interpreted

as "a one-way ratchet" pursuant to which the "victimizer[]," and not the "victim," would always have the advantage) (citation omitted).

In contrast, the court of appeals' interpretation of the MVRA does not create any potential for a "windfall" for the victim. Although petitioner speculates (Pet. 13-14) that some victims will purposefully delay the sale of collateral in order to obtain a larger restitution award, victims are unlikely to forgo an opportunity to minimize their losses in the hope of some day receiving restitution payments from a convicted defendant. In any event, however, if the victim has not yet sold the collateral by the time of sentencing, the district court can postpone entering its restitution order until the sale takes place. See, e.g., Dolan, 130 S. Ct. at 2539-2540; see also United States v. Himler, 355 F.3d 735, 745 (3d Cir. 2004).

2. The courts of appeals are not in full accord on the issue of whether return of collateral counts as return of property lost due to a fraudulent loan. Petitioner overstates the extent of the disagreement, however, and the issue does not warrant this Court's review.

a. Petitioner identifies the First, Third, Eighth, and Tenth Circuits as having taken the same view as the court below, although he states that they have done so only "implicitly." Pet. 10. But

all of the decisions he cites are distinguishable or non-precedential.[5]

In United States v. Innarelli, 524 F.3d 286 (1st Cir.), cert. denied, 555 U.S. 879 (2008), the First Circuit did not construe Section 3663A(b)(1)(B)(ii) or decide whether taking title to collateral constituted return of "the property." See id. at 295. The court of appeals merely held that the record was insufficiently detailed to determine whether the district court's restitution calculation was correct, and it remanded the case with the general statement that "the amount lost as a result of Innarelli's crimes" should "be offset by any amount recouped by the victim in question, including through resale of the property." Ibid.

The Third Circuit's decision in United States v. Himler, 355 F.3d 735 (3d Cir. 2004), also did not rule on whether the MVRA's

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[5] Petitioner acknowledges (Pet. 9-10) that the two Tenth Circuit decisions on which he relies do not constitute precedent in that court, and they contain little or no analysis of the relevant statutory provision. See United States v. Lipsey, No. 11-1536, 2013 WL 386529, at *5 (Feb. 1, 2013) (stating without elaboration that the district court acted within its discretion in rejecting the argument that "the restitution amount should be calculated based on the amount that the lender successfully bid on the properties at the foreclosure sale"); United States v. Bizzell, Nos. 92-6008, 92-6166, 1993 WL 411470, at *11 n.23 (Aug. 17, 1993) (rejecting defendant's claim that district court "should have credited him with either the value of the property as of the date the property was returned or as of the date of the loss"); see also 10th Cir. R. 32.1(a); Pet. 10 n.2 (distinguishing United States v. James, 564 F.3d 1237 (10th Cir. 2009)).

offset provision refers to collateral or to the cash from its sale, since the defendant in that case argued that the restitution award should have been offset by the value of real property on the date of sentencing. See id. at 744-745; see also id. at 739 (explaining that the defendant, who gave the victim bad checks, "deeded the property back" to the victim well before sentencing took place). The court of appeals rejected that argument and approved the district court's decision to "order restitution in the amount of [the victim's loss] minus the amount that would eventually be recouped from the future sale" of the real property, concluding that this approach "was not a postponement of the order of restitution but simply a way to ensure that [the defendant] would not be stuck with a larger bill than was necessary." Id. at 745; see ibid. (explaining that because the ultimate sale value of the real property was higher than its value as of sentencing, the defendant's restitution obligation was lower than it would have been "had the District Court placed a fixed price * * * at the sentencing hearing").

Finally, the parties in United States v. Statman, 604 F.3d 529 (8th Cir. 2010), disputed whether the "foreclosure sale price" or "the appraised value of the foreclosed property" provided a more appropriate measure of value in a case involving a loan obtained through fraud. Id. at 538. Emphasizing the district court's

general discretion to decide the proper approach, the court of appeals ruled that "[u]nder the circumstances of this case, the district court's use of the foreclosure sale price provided a fair and adequate representation of [the victim's] loss." Ibid. But the court took no position on the meaning of "the property" in Section 3663A(b)(1)(B)(ii), and did not consider whether the amount obtained by a victim in a sale conducted after the foreclosure would be a relevant measure of value. See ibid.

b. Petitioner contends (Pet. 9) that decisions from the Second, Fifth, and Ninth Circuits conflict with the decision below. That, too, is an overstatement.

The Second Circuit's discussion of the issue in United States v. Boccagna, 450 F.3d 107 (2d Cir. 2006), is mere dicta. See id. at 112-113. In a footnote, the court explained that the government had not argued "that the MVRA offset provision, by providing for loss to be reduced by 'the value . . . of any part of the property that is returned,' applies only to the actual cash expended by [the victim] in making the fraudulently obtained loans and not to any property that [the victim] obtained after default." Id. at 112 n.2 (quoting 18 U.S.C. § 3663A(b)(1)(B)(ii)). The court also stated that such an argument "would not be convincing." Ibid. But that stray observation -- which relied in part on a Seventh Circuit decision -- played no role in the court's analysis. Were the issue

squarely presented in a future case, the Second Circuit might well agree with the decision below instead.

The Fifth Circuit's decision in United States v. Holley, 23 F.3d 902 (5th Cir. 1994), cert. denied, 513 U.S. 1043 (1994) and 513 U.S. 1083 (1995), construed the Victim and Witness Protection Act of 1982 (VWPA), see 18 U.S.C. 3664(a), rather than the MVRA.[6] The court concluded that a victim who had extended a loan to the defendant had its lost property returned within the meaning of the VWPA when the victim purchased the collateral at a trustee's sale. See 23 F.3d at 914-915. But the court did not explain the justification for treating the return of collateral as equivalent to the return of cash. See ibid. In addition, in a subsequent appeal in the same case, the Fifth Circuit upheld the district court's decision on remand to calculate the offset using the proceeds of the victim's sale of the collateral six years after obtaining it, on the ground that the price paid for the property at foreclosure "had nothing to do with the actual value" and "there [was] no evidence that anyone was willing to purchase the property

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[6] Although the language of the VWPA provision discussing offset is the same as the language in Section 3663A(b)(1)(B), the VWPA has a different purpose, and different requirements, than the statute at issue in this case. For instance, an award of restitution under the VWPA is not mandatory, and the VWPA gives the court leeway to reduce or avoid a restitution order based on the defendant's financial circumstances. See, e.g., United States v. Leftwich, 628 F.3d 665, 668 (4th Cir. 2010).

for any amount of money[] prior to its sale" by the victim. United States v. Holley, No. 96-11160, 1998 WL 414260, at *1 (5th Cir. July 9, 1998).

The Ninth Circuit has squarely ruled that the collateral associated with a fraudulent loan counts as "property * * * returned" to a lender under Section 3663A(b)(1)(B)(ii). See, e.g., Yeung, 672 F.3d at 601 (citing, inter alia, United States v. Smith, 944 F.2d 618, 625 (9th Cir. 1991), cert. denied, 503 U.S. 951 (1992)). As the court below explained, the relevant cases in the Ninth Circuit depend on the "keystone" decision in Smith, Pet. App. 20a, 32a, which considered the offset provision of the VWPA and held that the district court "used incorrect dates" when it offset a victim's loss by the value of the collateral at the time of its ultimate sale. 944 F.2d at 625. Smith, in turn, relied on United States v. Tyler, 767 F.2d 1350 (9th Cir. 1985), a case involving the theft of timber in which the court held that the offset should have been calculated using the value of the timber on the date it was returned to the victim. The Smith court concluded that "[t]he same reasoning [in Tyler] should apply in determining the value of the collateral property in this case," which "should * * * be measured by what the financial institution would have received in a sale" as of the date it obtained title to the collateral. 944 F.2d at 625. Subsequent

Ninth Circuit cases that have applied Smith to interpret the MVRA have not addressed how a case involving stolen and returned timber has any bearing on whether collateral qualifies as "the property" lost by victims who gave a defendant cash. 18 U.S.C. 3663A(b)(1)(B).

c. The narrow conflict on the question presented does not merit this Court's review. The decision below is the first appellate case to consider in depth whether the transfer of title to the collateral securing a fraudulent loan constitutes return of "the property" under the MVRA's offset provision. The Seventh Circuit's analysis of the flaws in an interpretation of Section 3663A(b)(1)(B)(ii) that treats collateral as "the property," including the problems inherent in the Smith decision that supports later Ninth Circuit precedent, may convince the other courts of appeals to reject that interpretation going forward -- particularly those that have never previously analyzed the language of Section 3663A(b)(1)(B)(ii). Accordingly, the issue should be permitted to percolate further, and this Court's review would be premature at this juncture.

In addition, petitioner has not established (Pet. 11) that district courts are experiencing any real problem in deciding how to calculate the proper offset in cases like this one. Petitioner has identified only a handful of court of appeals decisions

addressing the issue, several of them approximately a decade old, and many of them emphasizing the discretion that district courts possess to determine "value" under the MVRA. See, e.g., Statman, 604 F.3d at 538. While prosecutions involving fraudulent loans will unquestionably continue to take place, in many cases the difference between the value of the collateral at the time the victim takes title to it and the value of the collateral at the time of a later sale will be negligible or nonexistent. See, e.g., Holley, 1998 WL 414260, at *1. In other cases, the value will actually increase over time -- a benefit that defendants in petitioner's position will undoubtedly welcome. The overall dollar value of loans obtained using fraudulent data, see Pet. 11, is therefore beside the point. As a practical matter, the question presented in this case is unlikely to arise with "regular[ity]." Ibid.

3. In any event, this case is an unsuitable vehicle to consider the question presented because petitioner failed to preserve the issue in the district court and cannot establish plain error.

Contrary to petitioner's contention (Pet. 14), he did not argue to the district court that Section 3663A(b)(1)(B)(ii) requires the offset to be based on the value of the houses on the date that the victims took title. The two pages of transcript that

petitioner cites (ibid.) in an attempt to show that he preserved the issue are part of the cross-examination of a witness, and consist of nothing more than a few questions about whether there was an appraisal of the property at the time of foreclosure or a subsequent change in value. See Pet. App. 99a-100a. Such questions are hardly sufficient to present a legal argument to the district court -- particularly in a case in which petitioner's written objection to the PSR, legal memorandum on restitution, and oral argument before the court never mentioned Section 3663A(b)(1)(B)(ii) or indicated that the date when title transferred was key to the analysis. See Docket entry No. 11, at 7; Objection to PSR 1-2. Indeed, that memorandum actually suggested that the relevant date could be sometime after the victims sold the properties, criticizing what petitioner described as a "rush" to sell the collateral "regardless of whether the sale price reflected the fair market value of the property at the time." Docket entry No. 11, at 7.

Because petitioner did not give the district court an opportunity to rule on the issue, review is for plain error only. See, e.g., Johnson v. United States, 520 U.S. 461, 465-466 (1997); United States v. Blair-Torbett, 230 Fed. Appx. 483, 490 (6th Cir. 2007) ("Because [defendant's] objection to the order of restitution made at sentencing was different from that raised on appeal, the

issue will be reviewed for plain error."). To establish reversible plain error, petitioner would have to show (1) that there was an error, (2) that was obvious, (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity or public reputation of judicial proceedings. Johnson, 520 U.S. at 466-467.[7]

Petitioner cannot make that showing. For the reasons given above, the district court did not commit a clear or obvious error in calculating the offset amount. See pp. 8-14, supra. But even if petitioner could establish that element of the plain-error test, he could not show that any error affected his substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. See Puckett v. United States, 556 U.S. 129, 135 (2009) (explaining that an error ordinarily does not affect substantial rights unless it "affected the outcome of the district court proceedings").

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[7] The court of appeals reviewed the district court's restitution award de novo in the course of determining whether any legal error existed. See Pet. App. 8a. Use of that standard of review is appropriate in addressing the first prong of the plain-error analysis, see United States v. Olano, 507 U.S. 725, 732 (1993), and does not indicate -- as petitioner contends (Pet. 14) -- that the court rejected the government's argument that petitioner failed to raise the Section 3663A(b)(1)(B)(ii) issue adequately at sentencing. The court simply did not reach that argument.

In particular, petitioner cannot show that the offset amount would have been meaningfully different under the approach he now proposes. See Puckett, 556 U.S. at 135. Given petitioner's failure to mention in the district court the possible relevance of the date that title to the collateral transferred, the record contains no evidence that establishes the value of the properties on the transfer dates. And to the extent the record speaks to the issue at all, it shows that when foreclosure occurred no ready market for the properties existed, which suggests that their transfer-date value was not significantly higher than the price that the victims later received. See Gov't C.A. Br. 22 (explaining that victims assumed title to the properties only after they failed to sell at sheriff's auctions); Pet. App. 70a (testimony from MGIC witness that MGIC neither "fire sale[s]" its properties nor "hold[s] property" in an effort to sell it at a higher price). Accordingly, petitioner could not benefit from a ruling adopting his position on which value to use for the offset portion of the restitution calculation. See Puckett, 556 U.S. at 135.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MYTHILI RAMAN
Acting Assistant Attorney General

KIRBY A. HELLER
Attorney

JUNE 2013

REPLY BRIEF

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FILED
JUN 12 2013
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No. 12-9012

IN THE

Supreme Court of the United States

BENJAMIN ROBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

CHRISTOPHER DONOVAN
PRUHS & DONOVAN, S.C.
757 N. Broadway, Ste. 401
Milwaukee, WI 53202

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SUPREME COURT
PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

JEFFREY T. GREEN*
JOSH C. HESS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

June 12, 2013

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ARGUMENT

The Solicitor General argues that Mr. Robers forfeited the question presented. But Mr. Robers raised that question at least twice during the restitution hearing, which is why the Seventh Circuit reviewed the question de novo in a 44-page opinion.

The Solicitor General also argues that only the Ninth and Seventh Circuits have decided the question presented. As the Seventh Circuit acknowledged, however, at least seven circuits have joined the split on that question. Pet. App. 20a, 37a. Moreover, that split will grow deeper still. After Mr. Robers filed the cert. petition, for instance, the question presented arose before a district court in the Eleventh Circuit. The split therefore requires this Court's intervention.

Finally, the Solicitor General defends the Seventh Circuit's holding that Mr. Robers returned no "part" of the lenders' money by surrendering the houses that secured that money. 18 U.S.C. § 3663A(b)(1)(B)(ii). The court was thus purportedly correct in refusing to reduce the restitution award by the houses' values on the surrender dates. But Mr. Robers did return part of the lenders' money by surrendering the houses. He returned the economic value that he had transferred from the money to the houses when he bought them. Section 3663A(b)(1)(B)(ii) therefore required the district court to reduce the restitution award accordingly. The Court should grant this petition to correct the Seventh Circuit's error on a recurring issue.

I. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

The Solicitor General argues that, during the restitution hearing, Mr. Robers forfeited the question presented. Opp. 21–24. If that were true, the Seventh Circuit would have reviewed the question for plain error. See Fed. R. Crim. P. 52(b). The Seventh Circuit also would have made short work of the question, since a district court cannot plainly err on an issue that divides the circuits. *United States* v. *Story*, 635 F.3d 1241, 1249 (10th Cir. 2011). But the court reviewed the question "de novo" in a 44-page opinion. Pet. App. 8a. Hence the court recognized that Mr. Robers had preserved the question presented.

That is for good reason. Defense counsel twice urged the district court to reduce the restitution award by the houses' values on the surrender dates, rather than the dates on which the lenders eventually resold the houses. First, he pressed a witness to admit that the values on the pre-recession surrender dates would be more accurate than the values on the post-recession resale dates. Pet. App. 99a–100a. Second, he argued in closing that reducing the restitution award by the resale price, rather than the houses' values at foreclosure, would require Mr. Robers to overpay. *Id.* at 119a–120a; see also Def.'s Restitution Mem., *United States* v. *Robers*, No. 10-cr-95 (E.D. Wis. Nov. 18, 2010), ECF No. 11 at 6–7. Mr. Robers thus sought the same result he seeks here, albeit with different arguments. That is sufficient to preserve the question presented. *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 330-31 (2010) ("Once a federal claim is properly presented, a party can make any argument in support of that claim;

parties are not limited to the precise arguments they made below.") (quotation marks and alterations omitted); *United States* v. *Billups*, 536 F.3d 574, 578 (7th Cir. 2008).

The Solicitor General also argues that the record "contains no evidence" to establish the houses' values on the surrender dates. Opp. 24. Thus, Mr. Robers purportedly cannot show that he would owe less if this Court decides to reduce the restitution award by the values on the surrender dates. *Id.* But the prosecution must prove the houses' values on the correct dates to establish the net amount of restitution that Mr. Robers owes. See *United States* v. *Huff*, 609 F.3d 1240, 1247 (11th Cir. 2010). If the record lacks evidence of the values on the surrender dates, then the prosecution failed to prove that Mr. Robers owes $218,952.18 in restitution. In any event, the Court may remand for the district court to hear more evidence about the houses' values on the surrender dates. See *United States* v. *Boccagna*, 450 F.3d 107, 113 (2d Cir. 2006); see generally *United States* v. *Chalupnik*, 514 F.3d 748, 755 (8th Cir. 2008). Such evidence will likely show that the surrender-date values were higher than the resale-date values, since the resales occurred after the housing market collapsed. For either reason, this Court's decision to use the surrender dates will likely reduce the restitution award. This case is an appropriate vehicle for resolving the question presented.

II. AT LEAST SEVEN CIRCUITS DISAGREE ON THE QUESTION PRESENTED.

1. According to the Solicitor General, Opp. 14–20, only the Ninth Circuit has held that defendants return "part" of victims' money by surrendering the collateral that secures the money. See *United States*

v. *Yeung*, 672 F.3d 594, 604 (9th Cir. 2012) (citing *United States* v. *Smith*, 944 F.2d 618, 625 (9th Cir. 1991)). The Solicitor General misreads decisions from the Fifth and Second Circuits, however, which have held the same as the Ninth Circuit.

The Solicitor General disputes that the Fifth Circuit joined the split in *United States* v. *Holley*, 23 F.3d 902, 915 (5th Cir. 1994). Opp. 18–19. There, the court concluded that the defendants "partial[ly] return[ed]" the victims' money when the defendants surrendered the collateral that secured the money. *Holley*, 23 F.3d at 915. The Solicitor General gives three reasons why that conclusion is not the Fifth Circuit's position on the question presented here. First, a different restitution statute controlled in that case, 18 U.S.C. § 3663. Opp. 18. But as the Solicitor General acknowledges, that statute's relevant text is the same as the text that controls here. *Id.* at n.6. Second, the *Holley* court purportedly explained its conclusion inadequately. Opp. 18. But the court decided the issue regardless, which is what matters to district courts in that circuit. Moreover, the court expressly adopted the reasoning of the Ninth Circuit, which undisputedly has decided the question presented. *Holley*, 23 F.3d at 902 (citing *United States* v. *Smith*, 944 F.2d 618 (9th Cir. 1991)). Third, a later panel in the same case did not follow the original panel's holding. *United States* v. *Holley*, No. 96-11160, 1998 WL 414260, at *2 (5th Cir. July 9, 1998) (per curiam). But the later decision was an unpublished, summary opinion by three judges not on the original panel. *Id.* According to the Fifth Circuit's own rules, the later panel's failure to follow the *Holley* decision was error. *Young* v. *Merill Lynch & Co.*, 658 F.3d 436, 443 (5th Cir. 2011) ("[T]he rule of orderliness forbids one of our panels from

overruling a prior panel.") (quotation marks omitted). The original *Holley* decision is thus Fifth Circuit law, and that circuit has joined the split.

The Solicitor General also disputes that the Second Circuit joined the split in *Boccagna*, 450 F.3d 107. Opp. 17–18. The Solicitor General dismisses as dicta the court's conclusion that the defendant "partial[ly] return[ed]" the victim's money by surrendering collateral that secured the money. *Boccagna*, 450 F.3d at 112 n.2; Opp. 17. But the conclusion was one reason the court held that § 3663A(b)(1)(B)(ii) required the district court to reduce the restitution award by the collateral's value on the surrender date. *Boccagna*, 450 F.3d at 118. Hence the purported "dicta" was in fact part of the holding. See *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 340 (1928) ("It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion."). Three circuits have therefore adopted Mr. Robers's position on the question presented.

2. According to the Solicitor General, the Seventh Circuit alone has held the opposite; namely, that courts must reduce restitution awards by the collateral's value on the resale date, because only then does a defendant partially return the victims' money. The Solicitor General dismisses three decisions that—based on facts the same as those here—also chose the resale date. *United States* v. *Innarelli*, 524 F.3d 286, 293, 295 (1st Cir. 2008); *United States* v. *Himler*, 355 F.3d 735, 739, 745 (3d Cir. 2004); *United States* v. *Statman*, 604 F.3d 529, 537, 538 (8th Cir. 2010).[1] Those decisions, the

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[1] The Solicitor General argues that *Statman* is distinguishable because the victim purportedly sold the

Solicitor General notes, did not address explicitly when the defendants partially returned the victims' money. But courts in those circuits must nonetheless use the resale date when they confront facts like those here—the same as if *Innarelli*, *Himler*, and *Statman* had explicitly held that the resale date is when the defendants partially returned the victims' money. Cf. *United States* v. *Russell*, 461 F.2d 605, 608 (10th Cir. 1972) (a higher court's decision is precedential even if that court overlooked an argument that might have changed the result). Thus, those three circuits agree with the Seventh Circuit on the question presented.

3. The question presented is recurring. It arose in the Tenth Circuit weeks before Mr. Robers filed his cert. petition. *United States* v. *Lipsey*, No. 11-1536, 2013 WL 386529, at *4–5 (11th Cir. Feb 1, 2013), *petition for cert. filed* (U.S. June 4, 2013) (No. 12-10638). The issue has since bedeviled another court. *United States* v. *Jordan*, No. 1:12-CR-2, 2013 WL 1333506 (M.D. Ga. Mar. 29, 2013). In *Jordan*, the court postponed the restitution hearing for supplemental briefs on the question presented here. *Id.* at *5. The court explained that the question was "complicated," the subject of a "Circuit split," and "critical" to deciding the restitution amount. *Id.* at

---

collateral without first taking control of the collateral. The Solicitor General misreads the opinion. The victim there "[e]ventually" resold the collateral after "regain[ing] control" of the collateral. 604 F.3d at 537; *see also* Sentencing and Restitution Hr'g Tr., *United States* v. *Statman*, No. 4:05-cr-0057 (E.D. Ark. Feb. 20, 2009), ECF No. 145 at 41–43, 64; *United States* v. *Rund*, No. 09-1767, 2009 WL 1764406 (8th Cir. June 10, 2009) (Statman's co-defendant's brief, arguing that the court should reduce the restitution award by the collateral's value on the date the victim "received" the collateral, rather than when the victim "finally took action to sell" the collateral).

*5. After the prosecution "failed to address the Circuit split," however, the court resolved the case on other grounds. *Id.* at *6, 8–11. More courts will confront the "complicated," *id.* at *5, question presented unless this Court intervenes. See Morgan Clemons, *Restitution for Federal Crimes: Will Mortgage Criminals Pay for the Real Estate Bubble?* 130 Banking L.J. 316, 317 (2013).

III. THE SEVENTH CIRCUIT IS INCORRECT.

Finally, the Solicitor General defends the Seventh Circuit's holding that Mr. Robers did not return the lenders' money by surrendering the houses that secured the money. Opp. 9. But the statute says that, to reduce the restitution award, a defendant need return only "part" of the lenders' money. *Id.* Mr. Robers did just that when he surrendered the houses. He returned the economic value that he transferred from the money to the houses when he bought the houses. See *United States* v. *Shepard*, 269 F.3d 884, 887–88 (7th Cir. 2001) (Easterbrook, J.). Thus the Solicitor General and Seventh Circuit are incorrect.

According to the Solicitor General, its reading ensures that the defendant pays the exact amount necessary to compensate lenders completely. Opp. 10–11, 13. But sometimes the Solicitor General's reading will require the defendant to overpay. Under that reading, a court may reduce a restitution award only if the lenders resell the houses before the restitution hearing. In some cases, the lenders cannot do so: Resale can take years, and courts may delay the restitution hearing more than 90 days after sentencing only if they timely and expressly reserve the power to do so. *Holley*, 23 F.3d at 914; *United States* v. *Pileggi*, 703 F.3d 675, 682–83 (4th Cir. 2013) (citing *Dolan* v. *United States*, 130 S. Ct. 2533

(2010)). In such cases, the defendant must therefore pay the *full balance* of the loans. The lenders may then resell the houses for a windfall. Thus the Solicitor General's reading creates the very "anomalies" the Solicitor General decries. Opp. 13.

The Solicitor General's reading will also impermissibly force defendants to pay for losses they did not proximately cause. See generally *United States* v. *Squirrel*, 588 F.3d 207, 215 (4th Cir. 2009); 18 U.S.C. § 3663A(a)(2). That reading requires defendants to compensate lenders for any decline in the houses' values between the time the defendants surrender the houses and the time the lenders resell the houses. See Pet. at 13. In some cases, the decline will result from unforeseeable events—like the Great Recession here. Hence the Solicitor General's reading (and the Seventh Circuit's) conflicts with the statute's policies as well as the statute's text. The Court should grant certiorari to correct that error before the error spreads further.

CONCLUSION

For these reasons, and the reasons stated in the petition, the writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER DONOVAN
PRUHS & DONOVAN, S.C.
757 N. Broadway, Ste. 401
Milwaukee, WI 53202

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SUPREME COURT
PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

JEFFREY T. GREEN *
JOSH C. HESS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

June 12, 2013

JOINT APPENDIX

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
DEC 13 2013
OFFICE OF THE CLERK

No. 12-9012

IN THE

Supreme Court of the United States

BENJAMIN ROBERS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

CHRISTOPHER DONOVAN *
PRUHS & DONOVAN, S.C.
757 N. Broadway
Milwaukee, WI 53202
(414) 221-1950
Donovanc34@hotmail.com

JEFFREY T. GREEN
JACQUELINE G. COOPER
DAVID R. KUNEY
JOSH C. HESS
JEFFREY S. BEELAERT
ADAM N. HALLOWELL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

DONALD B. VERRILLI, JR.*
SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-2217
SupremeCtBriefs@usdoj.gov

Counsel for Respondent

* Counsel of Record

December 13, 2013

[Additional Counsel Listed On Inside Cover]

PETITION FOR WRIT OF CERTIORARI FILED: FEB. 26, 2013
CERTIORARI GRANTED: OCT. 21, 2013

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
(MILWAUKEE)

Criminal Docket For Case #: 2:10-cr-00095-RTR-1

USA

v.

ROBERS

RELEVANT DOCKET ENTRIES

DATE FILED	#	DOCKET TEXT
5/18/2010	1	INFORMATION as to Benjamin Robers (1) count(s) 1. (Attachments: # 1 Information Sheet) (kaf)
05/18/2010	2	PLEA AGREEMENT as to Benjamin Robers (kaf)
		* * * *
06/08/2010	4	CJA 20 as to Benjamin Robers: Appointment of Attorney Christopher D. Donovan Signed by Magistrate Judge Patricia J Gorence on 6/4/10 nunc pro tunc 5/18/10. (cc: all counsel, Marshal, PTS & Financial) (kaf)
07/01/2010	5	Minute Entry for proceedings held before Judge Rudolph T Randa:

DATE FILED	#	DOCKET TEXT
		Plea Hearing Information as to Benjamin Robers held on 7/1/2010. Guilty Plea entered by Benjamin Robers as to the Information. Sentencing set for 11/5/2010 01:30 PM in Courtroom 320, 517 E Wisconsin Ave., Milwaukee, WI 53202 before Judge Rudolph T. Randa. O/R Bond set w/ conditions. (Court Reporter Sheryl Stawski) (Zik, Linda)
07/01/2010	6	WAIVER OF INDICTMENT by Benjamin Robers (Randa, Rudolph)
07/01/2010	7	ORDER Setting Conditions of Release as to Benjamin Robers. O/R Bond w/conditions Signed by Judge Rudolph T Randa on 7/1/2010. (cc: all counsel) (Randa, Rudolph)
		* * * *
11/18/2010	11	OBJECTIONS by Benjamin Robers. *Objection to restitution calculation* (Donovan, Christopher)
11/20/2010	12	RESPONSE by USA as to Benjamin Robers *Government's Restitution Memorandum* (Kraft, Carol)

DATE FILED	#	DOCKET TEXT
11/22/2010	13	Minute Entry for proceedings held before Judge Rudolph T Randa: Sentencing held on 11/22/2010 for Benjamin Robers as to Count 1 of the Information. Testimony given. 3 years Probation to commence today. Fine is waived. $218,952.18 Restitution due Joint and Several - See Minutes for additional information. $100.00 Special Assessment. Conditions of Probation imposed. SEE Judgment for additional details. (Court Reporter Heidi Trapp) (Attachments: # 1 Government Exhibit 1, # 2 Government Exhibit 2, # 3 Government Exhibit 3) (Zik, Linda) (Entered: 12/01/2010)
12/01/2010	14	JUDGMENT as to Benjamin Robers (1), Count(s) 1, 3 years Probation; Fine is waived; $218,952.18 Restitution due Joint and Several; $100.00 Special Assessment Conditions of Supervised Release/ Probation imposed. SEE Judgment for additional details. Signed by Judge Rudolph T Randa on 12/1/10. (cc: all counsel, Marshal, Probation & Financial) (kaf) (Entered: 12/02/2010)

* * * *

DATE FILED	#	DOCKET TEXT
03/31/2011	21	TRANSCRIPT of Sentencing Hearing as to Benjamin Robers held on November 22, 2010, before Judge Rudolph T. Randa. Court Reporter/ Transcriber Heidi J. Trapp, Contact (414) 297-3074. Transcripts may be purchased through the court reporter using the Transcript Order Form found here or viewed at the court public terminal. NOTICE RE REDACTION OF TRANSCRIPTS: If necessary, within 7 business days each party shall inform the Court of their intent to redact personal identifiers by filing a Notice of Intent to Redact. Please read the policy located on our website www.wied.uscourts.gov Redaction Statement due 4/25/2011. Redacted Transcript Deadline set for 5/5/2011. Release of Transcript Restriction set for 7/5/2011. (Trapp, Heidi)
08/05/2011	22	CRIMINAL APPEAL RECORD REQUEST RECEIVED from USCA for Benjamin Robers USCA Number: 10-3794 re 15 Notice of Appeal (jv)
08/05/2011	23	Certified Record on Appeal sent to USCA for Benjamin Robers USCA Number 10-3794 re 15 Notice of

DATE FILED	#	DOCKET TEXT
		Appeal record transmitted in PDF format via email to USCA, 1 vol in camera materials (PSR). (cc: all counsel) (Attachments: # 1 Docket Sheet)(jv)
12/06/2012	24	USCA MANDATE (certified copy) as to Benjamin Robers re 15 Notice of Appeal USCA Number 10-3794. For these reasons, we AFFIRM IN PART, VACATE IN PART, and REMAND to the district court for entry of a restitution order consistent with this opinion. (jv)
12/10/2012	25	ORDER as to Benjamin Robers Signed by Judge Rudolph T Randa on 12/10/2012 re 24 USCA Mandate. Parties to submit a joint brief on this matter, consistent with the Mandate, within 30 days of the date of this Order. (cc: all counsel) (Zik, Linda) (Entered: 12/11/2012)
01/10/2013	26	BRIEF by USA as to Benjamin Robers *Government's Position on Restitution* (Attachments: # 1 Exhibit 1) (Kraft, Carol)
01/10/2013	27	REQUEST for holding matter in abeyance until Supreme Court

DATE FILED	#	DOCKET TEXT
		decides petition by Benjamin Robers. (Donovan, Christopher)
01/14/2013		TEXT ONLY ORDER Signed by Judge Rudolph T Randa on 1/14/2013 as to Benjamin Robers APPROVING 27 Request filed by Benjamin Robers to hold in abeyance the Court's consideration of the restitution brief filed 1/10/2013 pending the defendant's petition for writ of certiorari to the US Supreme Court. (cc: all counsel) (Zik, Linda)
11/13/2013	28	ORDER on Petition from Probation Signed by Judge Rudolph T Randa on 11/13/2013 as to Benjamin Robers. The defendant may discharge from Probation as scheduled on 11/22/2013 with restitution owing. (NOTICE: To view this document use your e-fling log-in and password.) (cc: all counsel) (Zik, Linda) (Entered: 11/14/2013)

GENERAL DOCKET
SEVENTH CIRCUIT COURT OF APPEALS

Court of Appeals Docket #: 10-3794

USA

v.

BENJAMIN ROBERS

Appeal From: Eastern District of Wisconsin
Fee Status: In Forma Pauperis

Docketed: 12/03/2010
Termed: 9/14/2012

RELEVANT DOCKET ENTRIES

DATE FILED	#	DOCKET TEXT
12/03/2010	1	Criminal case docketed. IFP. Docketing statement filed. Appellant's brief due on or before 01/12/2011 for Benjamin Robers. Transcript information sheet due by 12/17/2010.[1] [6270287] [10-3794] (SM)
		* * * *
12/17/2010		TEXT ENTRY: Attorney Christopher D. Donovan for Appellant Benjamin Robers is

DATE FILED	#	DOCKET TEXT
		APPOINTED pursuant to the Criminal Justice Act. DW [6273461-2] [627346] [10-3794] (DS)
12/30/2010	3	Filed Seventh Circuit Transcript Information Sheet by Appellant Benjamin Robers. [3] [6276301] [10-3794] (CD)
		* * * *
02/25/2011	8	15 copies Appellant's brief filed by Appellant Benjamin Robers. [6289678] [8] Disk Filed. [8] [6289678] [10-3794] (CO)
02/25/2011	9	Filed 10 copies Supplemental Appendix by Appellant Benjamin Robers. [9] [6289680] [10-3794] (CO)
02/28/2011	10	Attorney Jonathan H. Koenig for USA in 10-3794 terminated and added Attorney(s) Carol L. Kraft for party(s) Appellee USA, in case 10-3794 per appearance form. Appearance Form filed by Attorney(s) Carol L. Kraft for party(s) Appellee USA, in case 10-3794. [10] [6290258] [10-3794] (FP)
		* * * *
04/29/2011	14	15 copies Appellee's brief filed by Appellee USA. [63046961 [14]

DATE FILED	#	DOCKET TEXT
		Electronically Transmitted. [14] [6304696] [10-3794] (AB)
		* * * *
05/12/2011	17	Appellant's reply brief filed by Appellant Benjamin Robers. Paper copies due on 05/19/2011. [6308268] [17] Electronically Transmitted. [17] [6308268] [10-3794] (LJ)
05/25/2011	18	Filed Appellant Benjamin Robers Citation of Additional Authority, per Circuit Rule 28(e). [18] [6310814] [10-3794] (Donovan, Christopher)
		* * * *
08/05/2011	21	Argument set for Thursday, September 15, 2011, at 10:30 a.m. in the Main Courtroom, Room 2721. Each side limited to 10 minutes. [21] [6327905] [10-3794] (RS)
08/08/2011	22	Original record on appeal filed electronically. Contents of record : 1 vol. of pleadings; 3 sealed documents. [22] [6328364] [10-3794]-[Edited 08/09/2011 by RT] (BT)
		* * * *
09/14/2011	25	Filed Appellee USA Citation of Additional Authority, per Circuit

DATE FILED	#	DOCKET TEXT
		Rule 28(e). [25] [6337480] [10-3794] (Kraft, Carol)
09/15/2011	26	Case heard and taken under advisement by panel: Joel M. Flaum, Circuit Judge; Daniel A. Manion, Circuit Judge and Diane S. Sykes, Circuit Judge. [26] [6337866] [10-3794] (RS)
09/15/2011	27	Case argued by Mr. Christopher D. Donovan for Appellant Benjamin Robers and Miss Carol L. Kraft for Appellee USA. [27] [6337867] [10-3794] (RS)
03/05/2012	28	Filed Appellant Benjamin Robers Citation of Additional Authority, per Circuit Rule 28(e). [28] [6379198] [10-3794] (Donovan, Christopher)
9/14/2012	29	Filed opinion of the court by Judge Manion. We AFFIRM in part, VACATE in part, and REMAND to the district court for entry of a restitution order consistent with the opinion. Joel M. Flaum, Circuit Judge; Daniel A. Manion, Circuit Judge and Diane S. Sykes, Circuit Judge. [29] [6427848] [10-3794] (AD)
09/14/2012	30	ORDER: Final judgment filed per opinion. With costs: No. [30] [6427850] [10-3794] (AD)

DATE FILED	#	DOCKET TEXT
		* * * *
10/26/2012	36	Filed Petition for Rehearing and Petition for Rehearing Enbanc by Appellant Benjamin Robers. Paper copies due on 10/31/2012. [36] [6438887] [10-3794] (AB)
11/28/2012	37	ORDER: Appellant Benjamin Robers Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. NOTE: Judge Flaum, although on the original panel, did not participate in the consideration of the petition for rehearing. [37] [6446028] [10-3794] (CD)
12/06/2012	38	Mandate issued. No record to be returned. [38] [6448064] [10-3794] (GW)
03/01/2013	39	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. 12-9012. [39] [6468077] [10-3794] (AM)
10/21/2013	40	Filed order from the Supreme Court GRANTING motion for leave to proceed in forma pauperis and the Petition for Writ of Certiorari. 12-9012. [40] [6524796] [10-3794] (FP)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Filed: May 18, 2010]

No. 10-CR-095

UNITED STATES OF AMERICA,
Plaintiff,

v.

BENJAMIN ROBERS,
Defendant.

PLEA AGREEMENT

1. The United States of America, by its attorneys, James L. Santelle, United States Attorney for the Eastern District of Wisconsin, and Carol L. Kraft, Assistant United States Attorney, and the defendant, Benjamin Robers, individually and by attorney Christopher D. Donovan, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, enter into the following plea agreement:

CHARGES

2. The defendant is charged in a one count information which alleges a violation of Title 18, United States Code, Section 371.

3. The defendant has read and fully understands the charge contained in the information. He fully understands the nature and elements of the crime with which he has been charged, and the charge and the terms and conditions of the plea agreement have been fully explained to him by his attorney.

4. The defendant voluntarily agrees to waive prosecution by indictment in open court.

5. The defendant voluntarily agrees to plead guilty to the information charging him with one count of conspiracy to commit wire fraud in violation of Title 18, United States Code, Section 371, set forth as follows:

(1) Beginning in approximately mid 2004, and continuing to on or about October 28, 2005, in the State and Eastern District of Wisconsin and elsewhere, the defendant, Benjamin Robers, and others, did knowingly combine, conspire, confederate, and agree to commit offenses against the United States of America, that is, wire fraud in connection with a mortgage fraud scheme, in violation of Title 18, United States Code, Section 1343.

OBJECT OF THE CONSPIRACY

(2) The object of the conspiracy was to obtain money by fraudulently inducing wholesale mortgage lenders, through false statements, misrepresentations, deception, and omissions of material facts, to fund mortgage loans for the purchase of residential properties by straw buyers, including a property located on Inlet Shores, Delavan, Wisconsin.

MANNER AND MEANS OF THE CONSPIRACY

(3) As part of the conspiracy the defendant and others agreed to act as buyers for the purchase of residential properties which they did not intend to occupy, and agreed to sign loan documents for mortgages that they did not intend to pay.

(4) As further part of the conspiracy one of the conspirators arranged to create, and did create, false documents concerning the buyers' income and assets which were used as part of the loan applications submitted to lenders in support of the mortgage loans for the property.

(5) In furtherance of the conspiracy, on or about June 30, 2005, Benjamin Robers, acting as a buyer, signed mortgage documents which falsely verified his income, assets and intent to occupy the residence and pay the mortgage, and caused the interstate wire transfer of loan funds of approximately $333,387.16 by Challenge Financial Investors Corp., Largo, Florida, from UBS Real Estate Securities, New York, New York, to the escrow account of Professional Title Services, at M&I Marshall and Ilsley Bank, Milwaukee, Wisconsin, for the purchase of a property located on Inlet Shores, Delavan, Wisconsin.

All in violation of Title 18, United States Code, Section 371.

6. The defendant acknowledges, understands, and agrees that he is, in fact, guilty of the offense set forth in paragraph 5. The parties acknowledge and understand that if this case were to proceed to trial, the government would be able to prove the following facts beyond a reasonable doubt. The defendant admits that these facts are true and correct and establish his guilt beyond a reasonable doubt:

Starting in approximately mid-2004, James Lytle and Martin Valadez, who are separately charged coconspirators, devised and executed a mortgage fraud

scheme in Walworth County, Wisconsin. The scheme was essentially as follows: Lytle, working as broker/ loan originator prepared false loan applications on behalf of straw buyers for the purpose of obtaining loan funds for the purchase of residential properties. Valadez located people, who in return for money, agreed to act as the straw buyers, that is buyers who did not intend to occupy the properties or pay the mortgages. The properties were sold by other coconspirators who paid Lytle and Valadez monies which were characterized as consulting fees and which were not disclosed to the mortgage lenders.

Some of the straw buyers who participated in the scheme, including the defendant, signed their own names to loan applications which misrepresented their income and assets, and to the mortgage documents which resulted in the sale of the property and the funding of the mortgage loans. Others assumed the identity of other persons for the purpose of signing the loan documents.

In furtherance of the conspiracy, the defendant signed false loan applications and other mortgage-related documents for the purchase of two properties including a property on Inlet Shores, Delavan, Wisconsin. Relying on the false information contained in the documents, Challenge Financial Investors Corp., a mortgage lender based in Largo, Florida, agreed to fund a mortgage loan for the defendant to purchase the Inlet Shores property, and on or about June 28, 2005, directed an interstate wire transfer of loan funds of approximately $333,387.16 from an account at UBS Real Estate Securities, New York, New York, to the escrow account of Professional Title Services, at M&I Marshall and Ilsley Bank,

Milwaukee, Wisconsin, for the loan, which closed on or about June 30, 2005.

No payments were made on the loan which later went into default and foreclosure.

This information is provided for the purpose of setting forth a factual basis for the plea of guilty. It is not a full recitation of the defendant's knowledge of or participation in this offense.

PENALTIES

7. The parties understand and agree that the offense to which the defendant will enter a plea of guilty carries the following maximum term of imprisonment and fine: 5 years and $250,000. The count also carries a mandatory special assessment of $100.00, and a maximum of three years of supervised release. The parties further recognize that a restitution order will be entered by the court.

8. The defendant acknowledges, understands, and agrees that he has discussed the relevant statutes as well as the applicable sentencing guidelines with his attorney.

ELEMENTS

9. The parties understand and agree that in order to sustain the charge of conspiracy to commit wire fraud as set forth in the information, the government must prove each of the following propositions beyond a reasonable doubt:

> First, that the conspiracy charged in the information existed;
>
> Second, that the defendant knowingly became a member of the conspiracy with an intention to further the conspiracy;

Third, that an overt act was committed by at least one conspirator in furtherance of the conspiracy.

SENTENCING PROVISIONS

10. The parties agree to waive the time limits in Fed. R. Crim. P. 32 relating to the presentence report, including that the presentence report be disclosed not less than 35 days before the sentencing hearing, in favor of a schedule for disclosure, and the filing of any objections, to be established by the court at the change of plea hearing.

11. The parties acknowledge, understand, and agree that any sentence imposed by the court will be pursuant to the Sentencing Reform Act, and that the court will give due regard to the Sentencing Guidelines when sentencing the defendant.

12. The parties acknowledge and agree that they have discussed all of the sentencing guidelines provisions which they believe to be applicable to the offense set forth in paragraph 5. The defendant acknowledges and agrees that his attorney in turn has discussed the applicable sentencing guidelines provisions with him to the defendant's satisfaction.

13. The parties acknowledge and understand that prior to sentencing the United States Probation Office will conduct its own investigation of the defendant's criminal history. The parties further acknowledge and understand that, at the time the defendant enters a guilty plea, the parties may not have full and complete information regarding the defendant's criminal history. The parties acknowledge, understand, and agree that the defendant may not move to withdraw the guilty plea solely as a result of the sentencing court's determination of the defendant's criminal history.

Sentencing Guidelines Calculations

14. The parties acknowledge, understand, and agree that the sentencing guidelines calculations included in this agreement represent the positions of the parties on the appropriate sentence range under the sentencing guidelines. The defendant acknowledges and understands that the sentencing guidelines recommendations contained in this agreement do not create any right to be sentenced within any particular sentence range, and that the court may impose a reasonable sentence above or below the guideline range. The parties further understand and agree that if the defendant has provided false, incomplete, or inaccurate information that affects the calculations, the government is not bound to make the recommendations contained in this agreement.

Relevant Conduct

15. The parties acknowledge, understand, and agree that pursuant to Sentencing Guidelines Manual § 1B1.3, the sentencing judge may consider relevant conduct in calculating the sentencing guidelines range, even if the relevant conduct is not the subject of the offense to which the defendant is pleading guilty. The parties agree that the government has identified one additional real estate transaction which qualifies as relevant conduct for the defendant, specifically a fraudulent transaction involving the sale of a property on Grant Street in Lake Geneva, Wisconsin on or about March 30, 2005, and that the government will recommend that the relevant conduct in this case be limited to that transaction and that the restitution be limited to the charged transaction and the one additional instance of relevant conduct.

Base Offense Level

16. The parties acknowledge and understand that the government will recommend to the sentencing court that the applicable base offense level for the offense charged in the information is 7 under Sentencing Guidelines Manual § 2B1.1(a)(1) and that an 10-level increase under Sentencing Guidelines Manual § 2B1.1(b)(1)(F) is applicable as the loss attributable to the defendant is more than $120,000 but less than $200,000.

Role in the Offense

17. Pursuant to Sentencing Guidelines Manual § 3B1.2, the parties acknowledge and understand that the government will recommend to the court that a 4-level adjustment be given for an mitigating role in the offense, as the defendant was a minimal participant.

Acceptance of Responsibility

18. The government agrees to recommend a two-level decrease for acceptance of responsibility as authorized by Sentencing Guidelines Manual § 3E1.1(a), but only if the defendant exhibits conduct consistent with the acceptance of responsibility. The defendant acknowledges, understands, and agrees that conduct consistent with the acceptance of responsibility includes but is not limited to the defendant's voluntary identification and disclosure to the government of any and all actual or potential victims of the offense prior to sentencing.

Sentencing Recommendations

19. Both parties reserve the right to provide the district court and the probation office with any and all information which might be pertinent to the sentencing process, including but not limited to any

and all conduct related to the offense as well as any and all matters which might constitute aggravating or mitigating sentencing factors.

20. Both parties reserve the right to make any recommendation regarding any other matters not specifically addressed by this agreement.

21. The government agrees to recommend a sentence of probation or supervised release with a condition of a period of home confinement.

Court's Determinations at Sentencing

22. The parties acknowledge, understand, and agree that neither the sentencing court nor the United States Probation Office is a party to or bound by this agreement. The United States Probation Office will make its own recommendations to the sentencing court. The sentencing court will make its own determinations regarding any and all issues relating to the imposition of sentence and may impose any sentence authorized by law up to the maximum penalties set forth in paragraph 7 above. The parties further understand that the sentencing court will be guided by the sentencing guidelines but will not be bound by the sentencing guidelines and may impose a reasonable sentence above or below the calculated guideline range.

23. The parties acknowledge, understand, and agree that the defendant may not move to withdraw the guilty plea solely as a result of the sentence imposed by the court.

FINANCIAL MATTERS

24. The defendant acknowledges and understands that any and all financial obligations imposed by the sentencing court are due and payable upon entry of the

judgment of conviction. The defendant agrees not to request any delay or stay in payment of any and all financial obligations.

25. The defendant agrees that, during the period of any supervision (probation or supervised release) imposed by the court in this case, the defendant will provide the Financial Litigation Unit (FLU) of the United States Attorney's Office with completed financial forms which will be provided by FLU, and will provide any documentation required by those forms. The defendant will provide FLU with such completed financial forms with required documentation within the first two months of supervision, at six month intervals thereafter during supervision, and within the last six months of scheduled supervision.

Fine

26. In light of mandatory restitution requirement, the government agrees to recommend that no fine be imposed on the defendant.

Special Assessment

27. The defendant agrees to pay the special assessment in the amount of $100 prior to or at the time of sentencing.

Restitution

28. The defendant agrees to pay restitution as ordered by the court. The defendant understands that restitution for this offense is mandatory and restitution shall be imposed by the court regardless of the defendant's financial resources. The defendant understands that the government has identified American Portfolio as the entity which is the ultimate victim of the fraudulent transaction described in the information and has identified MGIC as the entity

which is the ultimate victim of a second transaction involving the defendant, specifically the sale of a property located on Grant Street, in Lake Geneva, Wisconsin which the government has identified as relevant conduct. The defendant acknowledges and understands that the government will ask to court to order that the defendant make restitution for the losses sustained by both victims and further, that the defendant be held jointly and severally liable with others who are responsible for the two fraudulent transactions. The defendant agrees to cooperate in efforts to collect the restitution obligation. The defendant understands that imposition or payment of restitution will not restrict or preclude the filing of any civil suit or administrative action.

DEFENDANT'S COOPERATION

29. The defendant, by entering into this agreement, further agrees to fully and completely cooperate with the government in its investigation of this and related matters, and to testify truthfully and completely before the grand jury and at any subsequent trials or proceedings, if asked to do so. The government agrees to advise the sentencing judge of the nature and extent of the defendant's cooperation. The parties acknowledge, understand and agree that if the defendant provides substantial assistance to the government in the investigation or prosecution of others, the government, in its discretion, may recommend a downward departure from: (a) the applicable sentencing guideline range; (b) any applicable statutory mandatory minimum; or (c) both. The defendant acknowledges and understands that the court will make its own determination regarding the appropriateness and extent to which such cooperation should affect the sentence.

DEFENDANT'S WAIVER OF RIGHTS

30. In entering this agreement, the defendant acknowledges and understands that in so doing he surrenders any claims he may have raised in any pretrial motion, as well as certain rights which include the following:

a. If the defendant persisted in a plea of not guilty to the charges against him, he would be entitled to a speedy and public trial by a court or jury. The defendant has a right to a jury trial. However, in order that the trial be conducted by the judge sitting without a jury, the defendant, the government and the judge all must agree that the trial be conducted by the judge without a jury.

b. If the trial is a jury trial, the jury would be composed of twelve citizens selected at random. The defendant and his attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising peremptory challenges. The jury would have to agree unanimously before it could return a verdict of guilty. The court would instruct the jury that the defendant is presumed innocent until such time, if ever, as the government establishes guilt by competent evidence to the satisfaction of the jury beyond a reasonable doubt.

c. If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all of the evidence, whether or not he was persuaded of defendant's guilt beyond a reasonable doubt.

d. At such trial, whether by a judge or a jury, the government would be required to present witnesses and other evidence against the defendant. The defendant would be able to confront witnesses upon whose testimony the government is relying to obtain a conviction and he would have the right to cross-examine those witnesses. In turn the defendant could, but is not obligated to, present witnesses and other evidence on his own behalf. The defendant would be entitled to compulsory process to call witnesses.

e. At such trial, defendant would have a privilege against self-incrimination so that he could decline to testify and no inference of guilt could be drawn from his refusal to testify. If defendant desired to do so, he could testify on his own behalf.

31. The defendant acknowledges and understands that by pleading guilty he is waiving all the rights set forth above. The defendant further acknowledges the fact that his attorney has explained these rights to him and the consequences of his waiver of these rights. The defendant further acknowledges that as a part of the guilty plea hearing, the court may question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant intends to plead guilty. The defendant further understands that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

32. The defendant acknowledges and understands that he will be adjudicated guilty of the offense to which he will plead guilty and thereby may be deprived of certain rights, including but not limited to

the right to vote, to hold public office, to serve on a jury, to possess firearms, and to be employed by a federally insured financial institution.

33. The defendant knowingly and voluntarily waives all claims he may have based upon the statute of limitations, the Speedy Trial Act, and the speedy trial provisions of the Sixth Amendment. The defendant agrees that any delay between the filing of this agreement and the entry of the defendant's guilty plea pursuant to this agreement constitutes excludable time under the Speedy Trial Act.

Further Civil or Administrative Action

34. The defendant acknowledges, understands, and agrees that the defendant has discussed with his attorney and understands that nothing contained in this agreement is meant to limit the rights and authority of the United States of America or any other state or local government to take further civil, administrative, or regulatory action against the defendant, including but not limited to any listing and debarment proceedings to restrict rights and opportunities of the defendant to contract with or receive assistance, loans, and benefits from United States government agencies.

GENERAL MATTERS

35. The parties acknowledge, understand, and agree that this agreement does not require the government to take, or not to take, any particular position in any post-conviction motion or appeal.

36. The parties acknowledge, understand, and agree that this plea agreement will be filed and become part of the public record in this case.

37. The parties acknowledge, understand, and agree that the United States Attorney's office is free to notify any local, state, or federal agency of the defendant's conviction.

38. The defendant understands that pursuant to the Victim and Witness Protection Act, the Justice for All Act, and regulations promulgated thereto by the Attorney General of the United States, the victim of a crime may make a statement describing the impact of the offense on the victim and further may make a recommendation regarding the sentence to be imposed. The defendant acknowledges and understands that comments and recommendations by a victim may be different from those of the parties to this agreement.

EFFECT OF DEFENDANT'S BREACH OF PLEA AGREEMENT

39. The defendant acknowledges and understands that if he violates any term of this agreement at any time, engages in any further criminal activity prior to sentencing, or fails to appear for sentencing, this agreement shall become null and void at the discretion of the government. If this plea agreement is revoked or if the defendant's conviction ultimately is overturned, then the government retains the right to file any and all charges which were not filed because of this agreement. The defendant hereby knowingly and voluntarily waives any defense based on the applicable statute of limitations for any charges filed against the defendant as a result of his breach of this agreement. The defendant understands, however, that the government may elect to proceed with the guilty plea and sentencing. If the defendant and his attorney have signed a proffer letter in connection with this case,

then the defendant further acknowledges and understands that he continues to be subject to the terms of the proffer letter.

VOLUNTARINESS OF DEFENDANT'S PLEA

40. The defendant acknowledges, understands, and agrees that he will plead guilty freely and voluntarily because he is in fact guilty. The defendant further acknowledges and agrees that no threats, promises, representations, or other inducements have been made, nor agreements reached, other than those set forth in this agreement, to induce the defendant to plead guilty.

ACKNOWLEDGMENTS

I am the defendant. I am entering into this plea agreement freely and voluntarily. I am not now on or under the influence of any drug, medication, alcohol, or other intoxicant or depressant, whether or not prescribed by a physician, which would impair my ability to understand the terms and conditions of this agreement. My attorney has reviewed every part of this agreement with me and has advised me of the implications of the sentencing guidelines. I have discussed all aspects of this case with my attorney, and I am satisfied that my attorney has provided effective assistance of counsel.

For the United Date: 05-06-10

/s/ Benjamin Robers
BENJAMIN ROBERS
Defendant

I am the defendant's attorney. I carefully have reviewed every part of this agreement with the defendant. To my knowledge, my client's decision to enter into this agreement is an informed and voluntary one.

Date: 05-14-10

/s/ Christopher D. Donovan
CHRISTOPHER D. DONOVAN
Attorney for Defendant

States of America:

Date: May 17, 2010

/s/ James L. Santelle
JAMES L. SANTELLE
United States Attorney

Date: 05/17/10

/s/ Carol L. Kraft
CAROL L. KRAFT
Assistant United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Filed 11/18/10]

No. 10-CR-95

UNITED STATES OF AMERICA,
Plaintiff,

v.

BENJAMIN ROBERS,
Defendant.

DEFENDANT'S RESTITUTION MEMORANDUM

I. This Court need not determine the actual loss amount for restitution purposes if it exercises its discretion pursuant to *United States v. Sensmeier* and 18 U.S.C. § 3664(h) and apportions the amount of restitution Mr. Robers owes based upon his reduced culpability and limited economic resources.

18 U.S.C. § 3664(f)(1)(A) generally directs that courts shall order full restitution to each victim without consideration of the economic circumstances of the defendant. However, a defendant's financial resources and economic circumstances are relevant with respect to the manner in which the restitution order is structured (i.e. when determining whether an indigent defendant will be ordered at a minimum to make nominal periodic payments). *See* 18 U.S.C. § 3664(f)(3)(A) and (B). Further, "when there is more than one defendant that has contributed to the loss of

a victim, district courts enjoy the option of either imposing full liability on each defendant or apportioning the liability among the defendants to reflect the culpability and economic circumstances of each." *United States v. Sensmeier*, 361 F.3d 982, 990 (7th Cir. 2004); *see also* 18 U.S.C. § 3664(h). Such a determination will be reviewed on appeal for an abuse of discretion. *See id.* at 988.

By all accounts, Mr. Robers had an exceedingly small role in this offense. The overview of the offense (which is mainly accurate) is detailed in the PSR at ¶¶ 8-13. To summarize, Bradley Hollister, James Lytle, and Martin Valadez headed a scheme to defraud mortgage lenders in the Walworth County area. The object of the scheme was to induce the lenders to make mortgage loans on properties that were legitimately appraised, pocket exorbitant fees for their "services," and then let the properties slide into foreclosure. The scheme involved nearly 20 fraudulent transactions involving in excess of $4 million dollars of loan proceeds. Hollister, Lytle and Valadez invented the scheme, planned it, organized and executed it, and they of course profited the most from it. They used other individuals like Mr. Robers only to a very limited extent, and only for as long as they were needed. Mr. Robers was not told details of the scheme, and was recruited only for specific short-term tasks (in his case, to act as a "straw buyer" who filled out or signed no-documentation loan applications to help secure the loans).

Mr. Robers' involvement was limited to two properties where he acted as the buyer and falsely reported that he would use the property as his primary residence and reported inflated income numbers and false assets. As accurately reported in the PSR at ¶ 21,

Mr. Robers "was recruited and paid a pittance for his involvement" in the scheme (Mr. Robers received at most $500 for each property). As the PSR further accurately notes, "There is no indication he was aware of the extent of the fraud conspiracy and he appears to be one of, if not the least, culpable person involved." Indeed, the government agreed that a minimal participant role was appropriate for Mr. Robers, and the PSR so found that to apply. It is also reported at ¶ 53 of the PSR that Mr. Robers' positive monthly cash flow is $199, after accounting for modest monthly expenses.

Mr. Robers does not have the ability to pay anywhere near the full amount of restitution as determined in the PSR. There is no indication that his financial situation will change significantly at any time in the future. Also, Mr. Robers' culpability is substantially less than that of Hollister, Lytle, or Valadez. As noted, he only became involved when approached to act as a straw buyer, he was never told or made aware of the extent of the scheme, and he was paid very little in comparison to the overall fraud amount (or for that matter compared to what the leaders made off the scheme). As such, Mr. Robers' should not be ordered to pay the full restitution amount. Pursuant to *Sensmeier* and 18 U.S.C. § 3664(h), his culpability and economic circumstances indicate that a smaller amount of the restitution should be apportioned to him than the others who were more directly and heavily involved.

Mr. Robers proposes that his restitution liability should be one-half of his monthly positive cash flow over the course of four years of probation (the sentence he will be asking the Court to impose), or approximately $4,800. This amount is about five times the

amount he actually profited due to his participation in the scheme, but nonetheless reflects his overall lack of culpability and economic circumstances.

II. If this Court elects not to apportion Mr. Robers a smaller amount of the restitution as compared to others with greater culpability in the offense, then the government bears the burden of proving by a preponderance of the evidence what the actual loss amount was to the victim, and cannot include consequential or incidental loss in that amount.

The instant case concerns potential losses to two victims for two different properties: 900 Inlet Shores, Delevan, WI, the property that is the subject of the information (the government has identified American Portfolio Mortgage Corp. as the victim); and 911 Grant Street, Lake Geneva, WI (the government has identified insurance company MGIC as the victim). The government calculates the loss amount on 900 Inlet Shores as the difference between the loan amount ($330,000) and what it asserts the property sold for at a sheriff's sale ($164,000), or a loss of $166,000. For 911 Grant Street, the government relies on a spreadsheet provided by MGIC for a loss of $52,952.18, which includes the difference between the loan amount and sheriff sale price, but also fees associated with the foreclosure of the property such as attorney fees, "other expenses," "property preservation," "statutory disbursements," and other equally ambiguous and vague amounts.

"Federal courts possess no inherent authority to order restitution, and may do so only as explicitly empowered by statute." *United States v. Randle*, 324 F.3d 550, 555 (7th Cir. 2003). The Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, allows the

court to order restitution "in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense," and to order the defendant to return the property to the owner, or if that is infeasible, to pay the owner/victim an amount equal to the loss of value of the property. *See id.* at § 3663A(b)(1). The measure of relief under this statute, however, "is less generous than common law damages, since it does not extend to consequences beyond the diminution of the value of the property stolen or damaged- consequences that could easily exceed that diminution." *United States v. Scott*, 405 F.3d 615, 618 (7th Cir. 2005) (internal citations omitted). "This is because criminal restitution refers only 'to the restoration of something that the defendant had taken from the plaintiff, including a profit.'" *United States v. Havens*, 424 F.3d 535, 537 (7th Cir. 2005). A court may include in a restitution order only losses that are actually caused by the defendant's offense, and must exclude "consequential" or "incidental" damages. *See id.* at 538.

The Seventh Circuit has stated that "the line between criminal restitution and common law damages is important to maintain" as "restitution itself is no synonym for common law damages." *Scott* at 619. When determining restitution, it is important to consider "the difference between the damage to the victim's property and *other losses that the victim might sustain*." *Id.* (emphasis added). Blurring the line between criminal restitution and common law damages "would also complicate criminal sentencing unduly- and unnecessarily," because a crime victim who has a shot at collecting common law damages can bring a tort suit. *See id.* The *Scott* Court provides an illustrative example of direct versus consequential damages.

> If A tortiously damages B's factory, the cost of repairing the factory is direct damages; B's loss of business while the factory is shut down awaiting repairs is consequential damages. The former would be recoverable in a criminal prosecution, the latter not.

Id. at 619-20. Further, the Seventh Circuit has found error when a district court orders restitution by adopting in its entirety damages awarded in a civil state suit. *See Havens* at 538. The Court in *Havens* held that "a civil judgment award by itself, however, is insufficient to support an order of restitution because some damages and costs recoverable in a civil action, such as treble damages, consequential damages and attorney's fees spent in pursuing litigation against the wrongdoer, do not qualify as 'losses' under the MVRA." *Id.*

The government bears the burden of proving restitution by a preponderance of the evidence. *See* 18 U.S.C. § 3664(e). Separate and apart from potential foundational and hearsay issues with the evidence the government is relying upon to date, Mr. Robers asserts that the difference between the original loan amount and what the property sold for at a sheriff's sale is not caused by the crime. Consequently, it is not a "direct loss" appropriate for a restitution order. Importantly, the crime was not accomplished by the use of fraudulent appraisals for the properties in question, meaning the loan amounts themselves were not based on fraudulent or artificially inflated home values. The fraud occurred when the leaders of the scheme used people like Mr. Robers to pose as a buyer and sign loan documents that were false as to his income, assets, and intent to occupy. These were "no doc" loans and the lenders did not require any documentation whatsoever

to verify the information that was submitted. Hence, the scheme was limited to falsely obtaining a mortgage where the leaders pocketed the loan proceeds (paying individuals like Mr. Robers a pittance for their involvement), and then let the properties slide into foreclosure. The property was not stolen or damaged in any way, and was eventually returned to the victims

What the victims claim here, and what the government advances as the proper amount for a restitution order (and the PSR blindly recites), is the decline in the value of the properties *that were caused by factors other than the crime in question*. This request can be analyzed through the illustrative example provided in *Scott*: the defendant there is liable for the damage he caused to the factory, but is not liable for the loss in revenue when the factory is shut down for repairs. And that goes no matter whether the price for the product the factory makes (let's say "widgets") stays steady, increases, or decreases. *Scott* makes clear that if, during the close of the factory, the price of a widget drops by 30%, that the defendant cannot be ordered to pay for any lost revenue, much less the loss between the price widgets went for before the factory was damaged and whatever the price may be at some point in the future.

In this case, what caused the decline in value from the original loan amount to the sheriff sale amount for the properties is difficult to ascertain. The drop in value could have been due to the housing market itself, or due to the victim's rush to cut their losses with the properties and take whatever price they could get at a sheriff's sale, regardless of whether the sale price reflected the fair market value of the property at the time. Whatever the cause, it is the government's burden to prove that it was due to the crime in

question. What is clear is that Mr. Robers' involvement in a conspiracy to commit wire fraud was not the direct cause of the decline in home values that substantially reduced the ability of the lenders to recover the full value of their loans. The government and the lenders are trying to use the criminal forum to recover the value of the properties due to either market decline, their own decision of how to dispose of the property (at a sheriff's sale in a declining market), or some other factor. Their remedy for such a loss, if any, lay in civil court, and it is inappropriate and contrary to the MVRA for this Court to order otherwise under the guise of criminal restitution.

Respectfully submitted at Milwaukee, Wisconsin this 17th day of November, 2010.

/s/ Chris Donovan
CHRIS DONOVAN
Bar No. 1055112
Counsel for Defendant
PRUHS LAW OFFICE, S.C.
757 N. Broadway #401
Milwaukee, WI 53202
Tel: 414-221-1950
Fax: 414-221-1959

UNITED STATED DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Filed 11/20/10]

Case No. 10-CR-95

UNITED STATES OF AMERICA,
Plaintiff,

v.

BENJAMIN ROBERS,
Defendant.

GOVERNMENT'S RESTITUTION MEMORANDUM

The United States of America, by its attorneys, James L. Santelle, United States Attorney for the Eastern District of Wisconsin, and Carol L. Kraft, Assistant United States Attorney for said district, hereby submits a memorandum in connection with the restitution issues in this case.

INTRODUCTION

On July 1, 2010, Benjamin Robers pled guilty to an information charging him with conspiracy to commit wire fraud in violation of 18 U.S.C. § 371. The charge arose from his participation in a mortgage fraud scheme which involved the purchase of Walworth County, Wisconsin properties by straw buyers based upon materially false loan applications. The scheme was devised and implemented by separately charged defendant, James Lytle, who was employed as a mortgage broker. The scheme involved numerous properties. The defendant acted as a straw buyer for two of the properties. One property, located at 900

Inlet Shores, Delevan, Wisconsin is identified in the information to which he pled guilty. In connection with this purchase the defendant signed numerous mortgage documents including a mortgage loan note obligating him to make payments on a $330,000 loan with a 7% interest rate to a maturity date of July 31, 2035. The 900 Inlet Shore property served as the collateral for the note. The transaction involving the purchase of the second property, located at 911 Grant Street, Lake Geneva, Wisconsin is to be considered as relevant conduct for guideline and restitution purposes as set forth in the plea agreement. In connection with this purchase, the defendant also signed numerous mortgage documents including a mortgage loan note obligating himself to make payments on a $141,000 loan at 7.5% interest to a maturity date of April 1, 2035. The 911 Grant Street property served as collateral for the note.

After obtaining the loan funds, the defendant and his co-conspirators allowed the loans to go into default, which led to foreclosure proceedings. Following foreclosure, the property at 900 Inlet Shores, was acquired by American Portfolio which became the successor in interest to the original lender MIT Lending/Challenge Financial Services. American Portfolio purchased the note for $330,000 on December 29, 2005. The property at 911 Grant Street, Lake Geneva, Wisconsin was acquired by MGIC (Mortgage Guaranty Insurance Company) after it paid an insurance claim in the amount of $159,214.91 to Federal National Mortgage Association (FANNIE MAE) the successor in interest to the original lender, Paragon Lending.

On October 12, 2010, the probation department released a PSR, which included a total restitution

amount of $188,593, with $136,000 due to American Portfolio, and $52,592.18 due to MGIC. The defendant filed objections which did not address the accuracy of the proposed restitution figures, but did, among other things, argue that he should not be held jointly and severally liable for restitution but rather that he should be ordered to pay only a small portion of the total restitution on the theory that he was less culpable than his co-conspirators and that his personal financial circumstances weighed in favor of a minimal financial obligation. Government counsel responded to the objections in a memo which the PSR writer deemed too late to include in the PSR addendum, but which was delivered to both the court and defense counsel prior to November 5, 2010 sentencing date. In addition to addressing the defendant's objections, government counsel sought to correct the proposed restitution numbers, noting that the restitution due to American Portfolio is $166,000 not $136,000 and that the restitution due to MGIC is $52,952.18 not $52,592.00, and that the MGIC contact is Tom Dallmann, not Paul Dallman. The $166,000 figure is supported by the public records regarding the transfer of the property, and by statements to government counsel by Paul Kessel, the president and owner of American Portfolio. The $52,952.18 is also supported by public records, including a foreclosure judgment and by statements provided to government counsel by representatives from MGIC.

The defendant has asked the government to produce other documentation to support the proposed restitution and has questioned whether the losses claimed by MGIC are all properly the subject of a restitution order.

On November 17, 2010, the defendant filed a restitution memorandum, again arguing that he should not be held liable for the full amount of restitution due to the victims on the grounds that he is less culpable than others who participated in the scheme which included these two fraudulently procured loans, and that his financial circumstances are such that he does not have the ability to pay anything beyond a token amount toward the total restitution. He cites *United States v. Sensmeier*, 361 F 3d 982 (7th Cir. 2004) in support of his proposition, and suggests that a total of $4,800 is the appropriate amount of restitution for him. He asserts that if the court agrees with his restitution proposal, the court need not determine that actual amount of the restitution due in this case.

In addition, the defendant argues that in providing the current restitution numbers, the government has improperly included consequential damages, not recoverable as restitution, including the loss resulting from the decline in the housing market. In making this argument, the defendant offers several incorrect factual assertions, including an assertion that the properties were legitimately appraised in the first instance, that the loans obtained by the defendant were "no doc" loans and that the properties which served as collateral were voluntarily returned to the lenders and were not damaged in any way.

It is the government's position that the district court does have to make a restitution determination regardless of whether it accepts the defendant's proposal to hold him responsible for only a fraction of the total restitution, that the restitution claims submitted by the government on behalf of the victim lenders and/or their successors in interest are reasonable and sufficiently supported, and that the defendant should

be held jointly and severally liable for the full amount of the restitution.

The instant memorandum addresses the appropriate scope of restitution under the Mandatory Victim Restitution Act (MVRA) 18, U.S.C. § 3663(A), and which claimed expenses beyond the principal balance of the fraudulently obtained loans are properly the subject of a restitution order under the MVRA. Additionally, in deciding the issues raised by Robers, the government asks the court to take notice of the fact that the restitution amounts at issue here have already been articulated in the judgments of his co-actors. Specifically, in *United States v. John Boumenot*, Case No. 09-CR-194, Judge Adelman ordered restitution in the amount of $166,000 to American Portfolio relative to the property at 900 Inlet Shores, Delavan, Wisconsin. The restitution figure resulted from a stipulation by the parties based upon information from the public records and from Paul Kessel, the president and owner of American Portfolio. It was not based upon the difference between the original loan and the amount the property drew at sheriff sale, as the defendant asserts, but rather upon the difference between the original loan and the amount that American Portfolio obtained in an REO (Real Estate Owned) sale after it took possession of the property following foreclosure proceedings. Similarly, in *United States v. Eric Meinel*, Case No. 09-217, Judge Adelman ordered restitution in the amount of $52,952.18 to MGIC relative to the property at 911 Grant Street, Lake Geneva, Wisconsin. Again the restitution figure resulted from a stipulation by the parties based upon information from the public

records and provided by representatives of MGIC.[1] MGIC provided a loss breakdown which included the expenses it incurred as the result of being forced into a foreclosure proceeding and the costs of maintaining and selling the property as an REO property thereafter. Finally, this court's judgment in *United States v. Bradley Hollister*, Case No. 08-CR-228, ordered restitution of $52,592.00 to MGIC relative to the 911 Grant Street property, based upon a similar stipulation of the parties.[2] In light of this, it is the government's position that the correct restitution figures have already been established in those cases and should be adopted by the court in this case. However, the government is prepared to offer testimony on the restitution issues at the November 22, 2010 sentencing hearing.

DISCUSSION

I. The Proper Scope of the Mandatory Victim Restitution Act

Because the defendant was convicted of a crime of fraud, he is subject to the provisions of the Mandatory

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[1] The judgments for James Lytle and Martin Valadez, and who are also jointly and severally liable for the restitution due to American Portfolio and MGIC are pending adjustment following the sale of all of the properties that served as collateral for the loans obtained in this fraud scheme. Because the properties had not been sold at the time of sentencing, the district courts which heard the cases adopted a procedure by which they ordered restitution in the full amounts of the loans to be reduced later upon the ultimate resale of the properties. Counsel for Lytle and Valadez have indicated that they are prepared to stipulate to the amounts ordered in the Boumenot and Meinel cases.

[2] This number was inadvertently transposed in the government's original submission for this order, and should be $52,952.18, consistent with the judgment of co-defendant Eric Meinel.

Victim Restitution Act of 1996 (MVRA), 18 U.S.C. § 3663A(c)(1)(A)(ii) which requires a court to order a defendant to make full restitution to the victim of an offense involving fraud or deceit regardless of his own financial circumstances. The MVRA provides that in the case of an offense resulting in damage to or loss or destruction of property, the defendant shall be ordered to return the property to the victim, or if the return is impossible, impracticable, or inadequate, to pay an amount equal to the greater of the value of the property on the date of the damage, loss or destruction, or the value of the property on the date of sentencing, less the value as of the date the property was returned, or any part of the property that was returned. 18 U.S.C. § 3663A(b).

Under the statute, restitution is not limited to the return of the property or its actual value. The MVRA further provides:

> [I]n any case [the order should] reimburse the victim for lost income and necessary child care, transportation and other expenses incurred during participation in and investigation or prosecution of the offense or attendance at proceedings related to the offense. 18 U.S.C. § 3663A(b)(4). Thus, the statute allows for the inclusion of certain additional losses sustained by the victim.

Both § 3663(A) and its predecessor § 3663 have been understood to require restitution only for direct losses and not for consequential damages and other effects that may ripple though the economy. See *United States v. Shepard*, 269 F.3d 884, 887 (7th Cir. 2001) citing *United States v. Arvanitis*, 902 F.2d 489, 497 (7th Cir. 1990)(restitution is limited to the property subject to the offense and therefore excludes consequential losses). In *United States v. Scott*, 405 F.3d

615, 619 (7th Cir. 2005), the Court's analysis focused on the historic distinction between restitution and common law damages, concluding that the distinction is different and perhaps more helpful than the distinction between direct and consequential damages. See also, *United States v. Havens*, 424 F.3d 535, 537 (7th Cir. 2005). However, the determination of appropriate restitution remains complicated and neither the MVRA nor the case law appears to provide clear guidance for determining which damages are direct and which are consequential, or when costs that appear consequential, might nonetheless be included under the rationale of 18 U.S.C. § 3663A(b)(4).

Typically, lost interest or lost profits have been deemed to be properly the subject of restitution, under the theory that they represent a diminution of the property under 18 U.S.C. § 3663A(b)(1)(B)(I) and (ii). See *Shepard*, 269 F.3d at 886 (7th Cir. 2001) where the Seventh Circuit addressed a restitution order that included loss sustained in connection with money that had been taken from an interest bearing account. The Court said, "Restitution should include interest to make up for the loss of the funds' capacity to grow." See also *Milwaukee v. Cement Division of National Gypsum Co.* 515, U.S. 189, 195 (1995)("The essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss."). See also, *Havens*, 424 F.3d at 537, where addressing the scope of a restitution order, the Court said, "[C]riminal restitution refers only 'to restoration of something that the defendant had taken from the plaintiff, *including profit*.'" (citations omitted) (emphasis added).

A victim's costs, incurred while investigating the wrong doing, also have been found to be appropriately

part of a restitution order under the rationale of 18 U.S.C. § 3663A(b)(4). For example, in *Scott*, 405 F.3d at 619, the Court found that audit fees claimed by a defrauded bank, incurred when it was attempting to determine the extent of its loss, while seemingly consequential, were properly includable restitution costs under the theory that they were analogous to the cost of repairing a tortiously damaged building.

In the same opinion, the Court noted that attorney fees, seemingly analogous to the expenses of an audit, are generally (but not always) excluded from a restitution order.[3] But the opinion explains that attorney fees have been typically been excluded, not because they are consequential damages, but because under the traditional Anglo-American rule, the decision to award attorney fees is a part of procedural, rather than remedial law. *Scott, supra*, at 620. Citing *Scott*, the Court in *Havens*, seems to take the position that in some cases, attorneys' fees may properly be the subject of restitution. Addressing the question of what costs were recoverable by a woman who was the victim of identity theft, the Court said, "Fees paid to counsel or other experts for dealing with the banks and credit agencies in an effort to correct her credit history and repair the damage to her credit rating are also properly included in a restitution order." *Havens*, 424 F.3d at 539. On the other hand, in *United States v.*

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[3] *United States v. Seward*, 272 F.3d 831 (7th Cir. 2001)(victim of probate fraud scheme not entitled to recover attorney fees incurred challenging forged will in civil probate proceeding); *United States v. Shepard*, 269 F.3d 884 (7th Cir. 2001)(victims bilked out of money by hospital social services employee not allowed reimbursement for attorney fees incurred in a negligence suit against the hospital); *United States v. Arvanitis*, 902 F.2d 489 (7th Cir. 1990)(victim insurance company not allowed restitution for legal fees expended investigating fraudulent claim).

Radziszewski, 474 F.3d 480 (7th Cir. 2007), the Court opined in a footnote, that a victim lender was not entitled to attorney fees incurred in foreclosure. The Court did not discuss the rational for this position, noting only that previous cases had taken this position, and that the government had conceded the point. *Radziszewski, supra* at 487, n. 3. However, the precedent of *Radziszewski* and other cases which disallow attorney fees without analysis, seems to be in conflict with more recent decisions in the Seventh Circuit. In *United States v. Hosking*, 567 F.3d 329 (7th Cir. 2009) the Court rejected the defendant's argument that monies a defrauded bank spent on investigation and professional fees constituted consequential damages not caused by her fraud. The Court opined, "We disagree in principal, asserting that the bank's investigation was an important part of the investigation of the offense, in that it led to a determination of the actual amount of the embezzlement, and was therefore properly included in a restitution order. *Hosking*, supra at 5. In support of its reasoning, the Court cited *United States v. Adcock*, 534 F.3d 635, 643 (7th Cir. 2008)(applying § 3663A (b)(4) to include the cost of an external audit in a restitution award because it qualified as "other expenses incurred during participation in the investigation or prosecution of the offense); *United States v. Amato*, 540 F.3d 153, 161 (2nd Cir. 2008)(including attorney fees and accounting costs in a restitution award because these expenses are "so obviously" associated with investigation and prosecution, particularly in the case of fraud offense.) The Seventh Circuit's reference to the *Amato* case is of particular interest, since *Amato* expressly rejects the Seventh Circuit *Rasziszewski* holding that attorney fees may not be included in a restitution order under § 3663A(b)(4). See *Amato*, 540 F.3d at 161.

In the instant case, in light of the defendant's objections, the court should determine which damages claimed by the victims, seemingly consequential, are properly includable under § 3663A(b)(4). The district court's imposition of the restitution order will be reviewed for an abuse of discretion. *Rhodes, supra* at 953, citing *United States v. McIntosh*, 198 F.3d, 995, 1003 (7th Cir. 2000).

The restitution claim by American Portfolio contains no losses beyond the difference between the original loan (which is the price which American Portfolio president Paul Kessel stated that American Portfolio paid for the loan note when it purchased it) and the gross proceeds of the REO sale following foreclosure proceedings. Nonetheless, the defendant asserts that American Portfolio's loss is not a direct loss in that it resulted from a decline in the real estate market through no fault of the fraud. He claims that the fraud was not based on fraudulent appraisals or artificially inflated values. He argues that the properties which served as collateral were legitimately appraised in the first instance and that the falling real estate market resulted in a consequential loss for which the defendant bears no responsibility. This is contrary to the evidence gathered in the investigation and the government is prepared to offer testimony at the sentencing hearing to establish that the value of many of the properties that were purchased as part of this scheme, including the property at 900 Inlet Shores, were inflated. The testimony will establish that as part of the scheme, the 900 Inlet Shores property was sold to Jesus Serna (who was being impersonated by Jose Valadez, a different straw buyer) in January 2005. At that time, the conspirators obtained a loan in the amount of $300,000 based upon an appraisal completed by Alexander and Associates, an appraiser

repeatedly used throughout the scheme. These appraisals consistently hit the value proposed by the fraudsters. The appraisal gave the property a value of $304,000. At the same time, the Walworth County tax records for 2004, indicated the assessed value of the property to be $157,000 and the fair market value to be $206,711. Within six months of the January sale, the conspirators bumped up the value of the property by $30,000, and in July 2005, Robers obtained a mortgage loan for $330,000 although no upgrades or improvements had been made to the property to justify the large increase in value since the time of the January sale. Based upon this, the court should determine that the loss claimed by American Portfolio is a direct result of the fraud and appropriately subject to a restitution order.

Similarly, it is the government's position that the claims of MGIC as successor in interest to the original lender are the direct result of the fraud, and are not consequential damages, that is damages that do not flow directly from the actions of Robers and his co-conspirators, but only from the consequences or results of such actions. See *United States v. Rhodes*, 330 F.3d 949, 953 n. 1 (7th Cir. 2003).

MGIC claims that in addition to the principal balance of the loan, its losses include accrued interest to the date of foreclosure, the costs of foreclosure, expenses incurred for insurance, taxes and utilities, which were necessary to prevent diminution of the property, and the cost of marketing and selling the property. The rationale for considering these costs to be direct damages is as follows. The lender advanced the fraudulently procured loan funds in the amount of $141,000, relying on the defendant's promissory note to repay the loan with interest, and the value of the

subject property as collateral for the loan. Title 18 U.S.C 3663A (b)(1) provides that in the case of an offense involving damage to or loss or destruction of property, the restitution order may require the return of the property to the owner, or where impossible, impractical, or inadequate, may require payment in an amount equal to the greater of the value of the property on the date of the date of the damage, loss or destruction, or the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that was returned.

In the case of a mortgage note, the lost property is the money that was advanced to the borrower for the purpose of purchasing real estate, with that real estate serving as collateral for the loan. The lender relied upon the representation that the collateral was equal or greater than the value of the loan funds. However, because this loan was procured by fraud, when the loan went into default, the defendant failed to respond to default notices or to make any effort to voluntarily convey ownership of the property to the lender. Accordingly, the lender could not recover the $141,000, nor gain title to the collateral without the foreclosure proceeding, making the foreclosure and its costs, a direct result of the fraud. Absent the foreclosure proceedings, the defendant would be liable for the full amount of the $141,000 loan, plus accrued interest. Additionally, to the extent the foreclosure helped to define the victim loss, it is an expense incurred during participation in the prosecution of this fraud scheme, and compensable under § 3663A(b)(4), similar to the audit expenses allowed in *Scott* and *Havens*, *supra*, and envisioned in *Hosking*, *supra*. Finally, the actual value of the real property was substantially reduced by the expenses that the victim incurred in order to

preserve and sell the property so as to recoup some portion of the fraudulently obtained $141,000.

Based upon the foregoing, the government seeks restitution for these victims in the total amount of $218,952.18, with $166,000 to American Portfolio as the direct loss resulting from the fraudulently procured loan which funded the defendant's purchase of 900 Inlet Shores, and $52,952.18 to MGIC as the direct loss resulting from the fraudulently procured loan which funded the defendant's purchase of 911 Grant Street.

II. Joint and Several Liability

The defendant's other argument is that he should not be held liable for the full amount of the restitution which is ultimately due in this case, but rather that he should be apportioned responsibility for only a small part of it. As rationale for his position, he urges that he was merely minor participant in the scheme, involved in the purchase of only two of many properties, and unaware of the full extent of the scheme. He also argues that he has limited income and little prospect to improve it, so that his economic circumstances justify a reduced restitution obligation. Both of these arguments are without merit.

First, while it is true that the defendant was not involved in, nor necessarily aware of, the full extent of the fraud scheme, the government is not seeking to hold him responsible for the entire scheme. Rather, it is the government's position that he should be responsible for the losses that were incurred as the result of the two transactions in which he participated. Moreover, while the government agreed to accord him a minor role with regard to guideline sentencing calculations, the evidence does not show he was so

minimally involved as he urges. In addition to signing the loan applications that were falsified by his co-conspirators, on two separate occasions, he appeared at real estate closings and sat before a closing agent who presented him with multiple documents which he signed, including the mortgage loan notes, and the loan application upon which he confirmed that his fraudulent job title and salary were accurate and had not changed since the date of the application.[4] He completed these documents understanding that he would never make a mortgage payment nor occupy the properties that he willingly purchased.

Additionally, as the defendant acknowledges, pursuant to 18 U.S.C. 3664(f)(1)(A), the MVRA requires the court to order restitution to each victim in the full amount of the victim's losses, as determined by the court, without consideration of the economic circumstances of the defendant. Although the defendant may not earn a substantial salary, he is a young man and has many potentially productive work years ahead. His present economic circumstances should not excuse him from full responsibility in this case. He is not physically nor mentally unable to work. He is as likely as any of his co-actors to be able to contribute meaningfully to restitution. Accordingly, there is no reason order that he pay only a small portion toward the full restitution in this case.

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[4] These were not no doc loans, as he asserts in his memorandum. Rather in each case the underwriter's instructions indicated that his income must be supported by a paystub and telephone verification of his employment, or by a standard verification of employment form. These items were falsified and provided by the co-conspirators.

Dated at Milwaukee, Wisconsin this 20th day of November 2010.

JAMES L. SANTELLE
United States Attorney

By: /s/ Carol L. Kraft
CAROL L. KRAFT
Assistant United States Attorney

Bar Number: 1000117
Attorney for Plaintiff
OFFICE OF THE UNITED STATES ATTORNEY
Eastern District of Wisconsin
517 East Wisconsin Avenue
Room 530
Milwaukee, Wisconsin 53202
Telephone: (414) 297-1702
Fax: (414) 297-1738
E-Mail: carol.kraft.@usdoj.gov

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 10-CR-95

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BENJAMIN ROBERS,
Defendant.

Milwaukee, Wisconsin
November 22, 2010

TRANSCRIPT OF SENTENCING

BEFORE THE HONORABLE RUDOLPH T. RANDA, UNITED STATES DISTRICT JUDGE

APPEARANCES

For the Plaintiff:	United States Attorney By: Ms. Carol Kraft Assistant U.S. Attorney 530, U.S. Courthouse 517 E. Wisconsin Ave. Milwaukee, WI 53202
For the Defendant:	Pruhs Law Office By: Mr. Christopher Donovan Attorney at Law 757 N. Broadway Milwaukee, WI 53202

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[3] TRANSCRIPT OF PROCEEDINGS

THE CLERK: Case Number 10-CR-95, United States of America vs. Benjamin Robers. Called for a sentencing hearing. May I have the appearances, please. First for the Government.

MS. KRAFT: Good afternoon, Your Honor. Carol Kraft, Assistant United States Attorney, appears on behalf of the United States. With me at counsel table this afternoon is Agent Michael Sheen. He's from the F.B.I. Kenosha resident agency and he was the chief investigating Officer on this case and is also here because the prosecutor intends—the Government intends to present some testimony this afternoon on the issue of restitution.

THE COURT: All right. Good afternoon.

MS. VODAK: Good afternoon, Your Honor. Eileen Vodak with the Probation Office.

THE COURT: Good afternoon.

MR. DONOVAN: Attorney Chris Donovan appearing on behalf of Mr. Robers, who is here in person.

THE COURT: Good afternoon. The case is here for sentencing, and the Court put this off for purposes of the restitution—primarily for the restitution issue. And the Court has read the Government's memoranda, defense submissions, the other matters relative to the addendum which contains the objections, and is prepared to proceed. Before I do, I have to [4] inquire of you, Mr. Robers, as to whether or not you've had the same opportunity. So I will ask you, have you had the opportunity to go over all of this with your attorney, Mr. Donovan?

THE DEFENDANT: Yes.

THE COURT: Besides what's submitted, do you or Mr. Donovan have any further objections to any of the factual statements in the report?

THE DEFENDANT: No.

THE COURT: Does the Government have any additional objections or any objections to any of the factual statements in the report?

MS. KRAFT: Not the factual statements, Your Honor. The restitution that was set forth in the original memorandum that was presented by Ms. Vodak asserted that $136,000 was owed to American Portfolio. In my response, which—all of my responses I guess in this case have been late. The original objections were filed in this case while I was out of the office on vacation, and so when I came back I filed the response to those original objections. It was too late for Ms. Vodak to include in the addendum to the PSR, but I had had it delivered to the Court prior to the time that this was last scheduled for sentencing. In that I attempted to correct the—that figure. The proper figure is 166,000. I talked with Miss Vodak this morning, and she told me that she had checked her notes and she [5] agrees that the $136,000 was in error. That she had calculated that based on a $300,000 sales price, which was a sales price that was part of the scheme. It was not the transaction that involved Mr. Robers, however. It was a prior transaction in which the property was transferred from John Boumenot to Jesus Cerna (phonetic) for $300,000, and then 6 months later it was transferred from Mr. Cerna—well, actually Jose Valadez posing as Mr. Cerna, to Mr. Robers for $330,000. So she indicated to me that that was the correction that she would be prepared to agree with. Other than that, I

don't have any disagreements with anything that's in the PSR report.

THE COURT: And Probation agrees that that's the appropriate amount relative now, and that applies to the Inlet Shores property and the Grant Street property?

MS. VODAK: Yes, Your Honor.

THE COURT: All right. The Court will proceed to sentencing, but since the issue is—as the Court has indicated, revolves essentially around the restitution amount, I assume the Government is going to call their witness now?

MS. KRAFT: I am. I have two witnesses Your Honor, when I filed my memorandum—again, I apologize for that being late. Mr. Robers filed his on Thursday, and I just didn't have a chance to respond to it before Saturday. So I'm—obviously the Court has had an adequate opportunity to review it. The law that I set forth in it and the arguments that I made are [6] essentially the same legal analysis that I've relied on for all of the Defendants in this case, most of whom have stipulated—I think all of them have stipulated to the restitution amounts. Mr. Robers objects with respect to the restitution to both the amount to M.G.I.C., and the amount to American Portfolio. So I have Jim Farmer here today. James Farmer. He's from M.G.I.C., the Mortgage Guarantee—Mortgage Insurance Guarantee Corporation. And he is here to explain the expenses that were incurred as a result—how it is that Mortgage Insurance Guarantee Corporation acquired the loss on this, and what the loss figures are, and how he got to them. So he's present and ready to testify.

THE COURT: All right.

JIM FARMER, called as a witness, having been first duly sworn, on oath testified as follows:

THE CLERK: Please state your full name, and spell your last name for the record. State your full name and then spell your last name.

THE WITNESS: My name is Jim Farmer. My last name is spelled F-A-R-M-E-R.

DIRECT EXAMINATION

BY MS. KRAFT:

Q. Mr. Farmer, how are your employed, please?

A. I work at Mortgage Guarantee Insurance Corporation.

Q. And can you tell us how long you have worked at Mortgage [7] Guarantee Insurance Corporation?

A. Since 1987.

Q. And what is your—what is your job title there?

A. Currently I work in the quality assurance area of our company.

Q. I'm sorry. In the what?

A. Quality assurance review of—of our company.

Q. And can you tell us whether or not—well, specifically what does that entail? Just briefly.

A. Currently I look at transactions that have—through the Claims Department of our company. I look at what has—you know, what's being paid, the circumstances surrounding the loss, things like that. And looking at how the different Departments have worked on them.

Q. And what, exactly, is Mortgage Insurance Guarantee Corporation? What exactly does your company do?

A. M.G.I.C., which is the acronym for Mortgage Guarantee Insurance Corporation, is—we insure loans against default. When loans are made, typically—it started back—the company started back in the 50's. Loans that were made with less than a 20 percent down payment were considered high risk loans. And Mortgage Guarantee Insurance Corporation came about as a means to lower the risk to financial institutions by offering insurance against a default.

Q. And when a financial institution or a lending institution [8] approaches M.G.I.C. in the—in a request for mortgage guarantee insurance, what—generally what types of information are they required to present in order to obtain that type of insurance?

A. Depending on the program that's being insured, typically the lender has to provide the underwriting terms or an underwriting package that has to be reviewed so that that can be either—sometimes—we've had different programs that have been insured. This particular one I believe was one that was probably an underwriting package that was submitted to be reviewed, and then underwritten and insured.

Q. Okay. Now, when you say this particular one, I'd like to direct your attention to a claim that involved a property at 911 Grant Street in Lake Geneva, Wisconsin. Are you familiar with that claim?

A. Yes.

Q. And what lending institution submitted that claim to M.G.I.C.?

A. Countrywide, which is now Bank of America, submitted this claim on behalf of Fannie Mae.

Q. And have you reviewed certain documents from the original loan file earlier today when we discussed your potential testimony?

A. Yes.

Q. And from those documents were you able to ascertain that the [9] original lender in this particular transaction was Paragon Lending?

A. Yes. That was the institution that actually filed for the insurance benefits at the beginning when the loan was insured.

Q. And did—and so that—did Paragon Lending maintain possession of both the note and the servicing of this particular loan?

A. When the loan was made, I—obviously I don't really know what transpired. They were the entity that filed for the insurance, representing that—you know, and then from there the loan, you know, gets transferred, sold to, you know—probably got sold immediately to Fannie Mae, would be my guess, and then servicing was probably already in the works to be transferred as well.

Q. Okay. So I don't want to put words in your mouth, but just so we're clear, the original lender was Paragon Lending, and they are the lending institution that applied for mortgage guarantee insurance from M.G.I.C.?

A. Yes, that is correct.

Q. And then at some time thereafter Fannie Mae acquired the loan note itself?

A. Correct.

Q. And Countrywide assumed the servicing for the note?

A. That is correct.

Q. And at a later point in time, then, did one of those [10] entities file a claim with M.G.I.C. for a default on the note?

A. That's correct. Countrywide filed the claim on behalf of Fannie Mae.

Q. Countrywide filed a claim on behalf of Fannie Mae. All right. And when it did that, did it present certain losses and identify the source of those losses in support of its claim?

A. Yes. They submitted a claim for loss form, and their expenses were in line with the master policy for which we operate off.

Q. And you have a document in front of you which we've marked as Exhibit Number 1 for identification purposes, is that correct?

A. Yes.

Q. And I've submitted the Exhibit to the Court for the Court's review as well, and counsel has a copy. Do you recognize this, Mr. Farmer?

A. Yes.

Q. And what is this?

A. This was an outline that I had put together identifying basically how M.G.I.C. identified the loss that we sustained from insuring this loan.

Q. Okay. And can we just go through some of these expenses. So you reviewed the file and the—

A. Well, somebody in our company did. I didn't personally process the claim, no. But the—when the lender—the lender [11] obtained the default under the terms of the mortgage. A default can be, for example, the failure to pay the mortgage payments when they're due. Then they take action by accelerating the note and foreclose. After they foreclose and take title, they're eligible then to submit a claim to M.G.I.C. because they've suffered under the terms of our policy because of the fact that they are now entitled, from—as a result of the default that we insured. And from there M.G.I.C. will then evaluate the lender's—you know, eligibility for the claim and determine what our—what option we want to take in settlement of the claim.

The—M.G.I.C. has two options. One is that we can pay what's called a percentage option. The other option is that M.G.I.C. can acquire the property from the lender, and then liquidate it ourselves, thereby hopefully reducing the loss that we would sustain. And in this case, for example, the loss that is outlined here, is less than what we would have paid if we had just picked the percentage option when the claim was submitted.

Q. Okay. So let's start at the top of this. It says unpaid principal balance. That's a figure that you obtained—that M.G.I.C. obtained from the lender representing the unpaid principal balance of the loan at the time of the default, is that correct?

A. Correct.

Q. And then there is also a figure that represents accrued [12] interest, is that correct?

A. Yes. That's from the last paid installment date up until the—until the date the claim is basically settled.

Q. Okay. And then attorney's fees. What would those have been for?

A. Those are the lender's attorneys fees and actions. They could be in regards to foreclosure, eviction, any of those—bankruptcy, any of those actions.

Q. Okay. So you didn't break those down, but you know that that's—

A. —I did not—

Q. —a claim that they filed?

A. I did not. Just told—

Q. And then property taxes. Why would property taxes be included in the claim?

A. The lender advanced property taxes during the time of—after the borrower had defaulted, and so these are the property taxes for which they had already advanced.

Q. Okay. And then there's a category that says other expenses. Do you know what that is?

A. I don't know. I didn't—I don't have that itemized. But usually things that are in the other expense category are things like appraisals, broker price opinions, things like that.

Q. And those are things that are undertaken in order to attempt to sell the property and mitigate the damages, is that correct? [13] Mitigate the loss?

A. Yes.

Q. Okay. And then you have in here hazard insurance. Why would that be an expense?

A. The lender would have advanced hazard insurance to protect their collateral, so that if the loan was also escrowed, which this one was, they're paying the taxes and insurance every year, regardless if they're collecting the money from the borrower to pay them. So they're keeping those in force until the time that they submit their claim.

Q. Okay. And then property preservation. Can you tell us what that would include?

A. Property preservation includes things like utilities, yard maintenance, property inspections that the lender may have done. Anything that's going to basically protect and preserve property.

Q. To keep the property from losing value until it can be sold?

A. Yes. The thing is, you want to make sure that—for example, keeping utilities on so that the sump pump can run. Things like that.

Q. And then there are statutory disbursements. Can you tell us what those are?

A. Statutory disbursements are the foreclosure—we refer to them as the foreclosure costs, eviction costs. They would be costs associated with taking some sort of action that is not for [14] legal fees, but it's other costs incurred in those particular actions.

Q. Okay. And then it says less ending escrow balance. What does that mean?

A. At the time that the—what we do to process the claim is that there was an escrow balance at the time that the last paid installment was made, and so we

deduct that, because that's a positive amount. So we deduct that from the claim, and then let them claim all the advances they make after that date.

Q. So according to this your total payment to the lender under the insurance policy was $159,214.91, is that correct?

A. That's correct.

Q. Now, you indicated that as opposed to paying a percentage of that under the policy, you chose to acquire the property, which I assume had already been acquired by the lender as part of the foreclosure proceedings, is that right?

A. That's correct. I mean, that's another thing that they would be required to do, would be to transfer the title to us.

Q. So that unless Mr. Robers had agreed in some way to sign over the warranty deed to the lender, the lender would have essentially had to go through the foreclosure in order to gain possession of the property?

A. Yes. That, or deed in lieu of foreclosure.

Q. Now, you indicated that you decided to acquire the property because you thought you could mitigate the expenses or the loss [15] that you suffered as a result of the default on this loan, is that correct?

A. That's correct. Well, to mitigate that loss.

Q. Mitigate it. And so is that what we have under the R.E.O. expenses?

A. Yes. After M.G.I.C. or any institution, I suppose, acquires a property, we—we did carry insurance on the property ourselves. We did have the utilities put in our name so that we could have utilities on. We obtained a title commitment so that we could

guarantee that we had clear title transferred from Fannie Mae to M.G.I.C. We had to order our own opinion of value so that we can make our assessment. And then we did—there was a claim investigation done at the time when the claim came in, as well.

Q. And eventually you did sell the property?

A. Yes, we did.

Q. For 107,000—excuse me, $118,000, is that correct?

A. That is correct.

Q. And then what are these other expenses associated with the sale?

A. We paid a real estate broker to manage the property for us, and then they earned that—that fee in selling the property. Prorated taxes that were on the settlement statement. Those were the taxes that had accrued and not yet been paid, but they were charged to M.G.I.C. as the seller. We had to pay for an [16] owner's title policy at closing. And then the other settlement charges are things like recording costs and things like that.

Q. So your net proceeds, then, were $107,908.93?

A. That's correct.

Q. And so you were able to actually substantially reduce the loss on this claim that resulted from the fraudulent sales—sale in the first instance, by taking the property and R.E.O. and expending these additional monies in order to liquidate it, is that correct?

A. Correct. It was a way to mitigate our loss. To reduce it.

Q. And so your final loss was $52,952.18?

A. Correct.

MS. KRAFT: That's all. I don't have anymore questions for Mr. Farmer. I would ask that Exhibit Number 1 be received and made part of the record at this hearing, Your Honor.

THE COURT: The Court will receive Exhibit 1, make it part of the record. Any cross examination?

MR. DONOVAN: Yes, Your Honor.

CROSS EXAMINATION

BY MR. DONOVAN:

Q. I'd like to briefly go through again the ownership. You said the first lender was Paragon Lending?

A. That's who the insured was at the time that the loan was—that the insurance was written.

[17] Q. And do you know what their loan amount was?

A. I'm sorry. I didn't hear you.

Q. Do you know what their loan amount was? How much did they lend?

A. What the original loan amount was?

Q. Yes.

A. I didn't look that up. I'm sorry. Whatever the original loan was. It was taken out for.

Q. So then Paragon at some point sold to Fannie Mae, is that correct?

A. Yes. At some point in time the loan was sold to Fannie Mae.

Q. Do you know what Fannie Mae paid for the loan?

A. No. I would not know that, no.

Q. Because, again, you—basically your company just provides insurance in case of default, right?

A. We insure the loan against default.

Q. Now, does that coverage carry over every time the property—or I'm sorry. Not the property. Every time the loan is sold, does that coverage carry over?

A. There are provisions within our policy that allow for transfers like this, for the insurance then to survive that kind of an assignment.

Q. So even though Paragon was the first lender, that coverage carried over to Fannie Mae, correct?

A. Correct. It would just simply be assigned.

[18] Q. And again, you don't know what Fannie Mae paid for the loan. You don't know if it was the full amount?

A. No. There would be no way for us to know that.

Q. Okay. And then was Fannie Mae—you said that Countrywide serviced the loan. But did Fannie Mae remain the owner at that point?

A. Typically that—yes. Fannie Mae doesn't service their own loans.

Q. And Countrywide, on behalf of Fannie Mae, is the one who filed the claim with you?

A. That's correct.

Q. Okay. Now, is it safe to say up to the point where the property went into foreclosure, you had no control over it. No ability to do anything with it, correct?

A. I'm not sure I understand.

Q. Okay. I'm sorry. Let me try to make it more clear. So your involvement begins when there's a default. That's what you insure against?

A. When the loan is in default, the servicers file what's called a notice of delinquency to us, to make us aware of the fact that a loan that we insured is in default. So that is when—they would submit that usually within like 4 months of the default.

Q. Okay. Do you know how many payments were made on this property before it defaulted?

[19] A. I didn't look. I'm sorry.

Q. So at what point were you contractually obligated to pay the loss amount?

A. The—once the lender took title and was in possession, we were able to then ascertain what their loss was and their position was to be in a claimable position. And that's when we then took and made the decision that we made to acquire, as opposed to just paying the percentage option.

Q. Now, when you take control of the property, as opposed to settling for a percentage, is it typical that you want to just basically cut your losses and sell the property as quickly as possible?

A. That's not really our model, no.

Q. What would you say your model is?

A. Our model isn't to—because I'm not sure I understood your question, but it sounded to me like you're asking do we almost fire sale our properties. We do not. First of all, M.G.I.C. is not a lending institution. So the one thing is that we—the properties that we acquire—typically we want to make sure that they're in good condition and that they can be finance-

able, because we're—they have to be put out there for anyone to finance, including things like V.A. and F.H.A. So we want the properties to show well so that any buyer would be—anyone off the street could walk in and purchase the property. Not target them, for example, to just say a group of investors. [20] That's really not the way that we acquire and sell properties.

Q. You could have held the property, correct?

A. I beg your pardon?

Q. You could have continued to hold the property and try and sell it at a higher price, correct?

A. I don't know what you mean by continued to hold it and sell it at a higher—the property was acquired. Was placed on the market. And then—you know, and then based upon feedback from our broker and from potential people who had viewed the property we made the decision that we made to liquidate it.

Q. And, again, that was your decision when and how to sell it, correct?

A. I'm sorry?

Q. It was your decision, the company's decision, on where and when to sell it, correct?

A. Yes.

Q. Did you have an appraisal done at that time? After you took control of the property?

A. We took the—we did the evaluation before we acquired the property. And then we just get updated values after the property is acquired.

Q. I'm sorry. What do you mean by updated values?

A. In other words, if the property has not sold within let's say 90 days, then we'll ask the broker to

send us a new broker's price opinion. Giving us new comps. Telling us what's going on [21] with the market. In other words, has the market shifted? You know, are there things we need to be concerned with? All of a sudden do we have a lot more inventory in a given market? You know, things like that, that would influence. You know, maybe—there's other things that could influence it, too, but that's the reason why we ask them to give us updated marketing information so that we know what's going on with the market so we can make the decisions that we make.

Q. But again, that's not the same as an appraisal?

A. A broker's price opinion?

Q. Right.

A. We don't—we use broker's price opinions. We don't use appraisals. We only use appraisals if we can't get broker's price opinions.

Q. Okay. So again, I just want to clarify. You don't know what Fannie Mae bought the loan for from Paragon, so you don't know if they suffered a loss on what they bought the loan for, correct? It could have been for the full amount of the loan. It could have been for a fraction of it. You just don't know?

A. I don't know how that is structured, no.

Q. And you acquired this property again singly pursuant to a contract, right? This wasn't a package where you got a bunch of properties. This was just because of the one default?

A. Right. The thing is, is that it's insured under a master policy. The lender's filing a claim under the terms of a master [22] policy between us and that lender.

Q. Okay. Now, referencing Exhibit 1—and I know the Government went through these numbers. I'm not going to go through them again. But is it fair to say the figures listed under claim, down to total claim paid, those are—those are fees that were incurred before you took ownership, correct?

A. Took—yes, that is correct.

Q. And then the expenses from R.E.O. expenses down to that next total expenses was fees that you incurred after you took ownership?

A. Correct.

Q. And then between recovery from sale and proceeds, that was further fees and different items that you incurred trying to sell the property?

A. That is correct.

Q. So let me back up to the first block of numbers under the original claim that was incurred before—before you took ownership. These numbers were just provided to you from Fannie Mae?

A. Countrywide.

Q. I'm sorry. Countrywide?

A. Filed this. They're the ones who submitted this.

Q. Did you do any independent investigation or do you have any independent knowledge of these numbers? Or was it just basically a spreadsheet like this one that was handed to you?

[23] A. No. They submit documentation such as their mortgage loan history, for example. Things like that. To identify what they are.

Q. So it's a more kind of detailed package than this? It's not just a summary?

A. Yeah, it's not—it's not this.

Q. But you didn't review that yourself?

A. Pardon me?

Q. You didn't review that yourself? I believe you testified that someone else—

A. I took the information from our system.

Q. Okay.

A. I mean, you know, the thing is somebody else reviewed the claim.

Q. Okay. So again I'm asking I guess your personal knowledge. Was this just—did you just take these numbers out of the system without further analysis or investigation? Yourself. You personally.

A. I didn't—I did not analyze the claim, if that's what you're asking.

Q. Right. So actually—let me back up a little more. Did you prepare the spreadsheet? You prepared Exhibit 1, correct?

A. Correct.

Q. And so the numbers between the first claim and the first total claim paid, those are all just numbers that you transposed [24] from other sources, is that fair to say?

A. From other sources? They're the—it's the data that's on our system that we use to manage our claims.

Q. So you just pulled those off the system and put them here, correct?

A. Yes, I did.

Q. And then how about—the same question with—between the R.E.O. expenses and the total expenses.

Again, did you just pull those from the system? Or did you figure these yourself independently?

A. Those were the items that were actually paid out. Those—I took those from our financial transaction system. Those were all bills that had actually been paid.

Q. Okay. Do you know, for example, the broker's commission? What percentage that came out to be?

A. I'm going to guess that it's 6 percent.

Q. Is that standard?

A. That's standard in the State of Wisconsin, yes.

Q. Do you ever have properties you dispose of where the broker takes less?

A. Trying to think. It would have to be very special type of circumstances where, for example, the lender—or the realtor really didn't actually market the property. They just simply maybe closed the transaction for us, or something. I don't know. But typically, no. We—we usually pay whatever the [25] standard commission is in a given State. We don't usually pay less.

Q. But you chose the broker, correct?

A. We chose the real estate broker, yes.

Q. And then you chose to continue to pay taxes on the property to keep current on the property tax, correct?

A. We chose to pay the property taxes so that they don't become a priority lien against the property.

Q. Right. But that's a decision that your company made, right? To keep the taxes current?

A. Yes. So it doesn't go into tax default. But we actually—M.G.I.C. didn't actually advance any property taxes on this.

Q. I'm sorry? What?

A. M.G.I.C. didn't actually advance any property taxes. The property taxes that were paid were a proration at the time of the sale. When you close on a—when you close or sell a piece of property, you have a seller and a buyer. And the property taxes are prorated for whatever the fiscal year is for that particular property. So that the seller is responsible from the beginning of the fiscal year until the date the transaction closes. And then the purchaser or buyer is responsible for them after that. Since taxes are paid in the State of Wisconsin annually, then the taxes here—I don't remember what day we closed, but whatever the taxes had accrued and had not yet been paid, we paid for that portion of the fiscal year. So that then [26] the buyer would then be responsible for paying the remaining part of it when the taxes came due.

MR. DONOVAN: Thank you for the explanation. I have no further questions.

THE COURT: Any redirect?

MS. KRAFT: Just a couple questions.

REDIRECT EXAMINATION

BY MS. KRAFT:

Q. Just so that we're clear, when the claim is filed, the lender provides documentation to M.G.I.C. to support the things that are in the claim, is that correct?

A. Yes.

Q. And those items are taken by someone else in your company, but taken and entered into a system that is part of your regular business records, is that correct?

A. We have two ways of doing it, but yes, we can enter the data into the system, and we have the means for the lender to enter it directly for us. And then we just double check it.

Q. And so when you brought your file here today and reviewed the file in advance in order to prepare this spreadsheet, you took information that had already been provided to your company in connection with this claim that was—that is supported somewhere in your business records, is that correct?

A. Correct. Another work group.

Q. You just didn't make these numbers up because they seemed [27] like good numbers, did you?

A. No. These were the numbers that were used in settling the claim.

MS. KRAFT: Okay. Thank you. I don't have anything else.

THE COURT: Anything else?

MR. DONOVAN: Just a couple follow-up

RECROSS REGROSS EXAMINATION

BY MR. DONOVAN:

Q. In this case do you know if the lender entered the numbers directly? Or did someone from your company?

A. Pardon me?

Q. I believe you said there's two ways the numbers can be entered into the system. One is you do it.

Someone at your company. Or the other is the lender does it directly and then you double-check, correct?

A. Correct.

Q. Do you know which one happened in this case and for this property?

A. This one we entered.

Q. You entered?

A. We entered the information from the customers. The customers sent this in to us via paper.

Q. Okay. And then one other question. How does your company decide whether to acquire the property, or do a percentage [28] settlement?

A. We have a computer model that we enter all the different data from regarding the claim amount; the—what the projected sales price would be; how much we think that we would have to take care of utilities and property maintenance; whether or not we feel that we have to do any repairs to the property; things like that. We enter it all into a model, and the model then tells us what the—what would be the best outcome for us to pursue.

Q. So fair to say it's a pretty deliberate choice on your part, and obviously at this stage you know that the house is in default, so you're trying to make the best decision you can to mitigate your loss, correct?

A. Right. M.G.I.C. is wanting to obviously reduce the loss to whatever extent that we can.

Q. And I guess my final question would be do you know what causes the property to lose value? For example, if the original loan amount was 140,000, you eventually sell it for 118, what can cause that loss? Do you know what causes it?

A. Well, I mean, there's a lot of factors that can influence that.

Q. Can you name any?

A. One might be the fact that in a given community —let's say that they have one major employer, and the employer shuts down. That could have a major impact in the value of a property. You [29] could have—the individual property itself could be influenced by several different things. Maybe, you know, the City's gone in and decided to do some sort of special assessment in the area and now, you know, somebody doesn't want to take on those responsibilities. It could adversely influence the value of the property. I don't know.

Q. Fair to say that the general real estate market could impact the value of the property?

A. I'm sorry?

Q. Is it fair to say that the general real estate market at the time can impact the value of the property?

A. Yes. You mean like the current situation?

Q. Correct.

A. Yes, that can certainly influence it.

MR. DONOVAN: I have no further questions.

THE COURT: All right. Anything else of this witness?
MS. KRAFT: I don't have anymore questions from

Mr. Farmer. But if the Court doesn't have anymore questions, if he could be excused?

THE COURT: All right. You may step down, Mr. Farmer. Thank you. Watch your step, please.

THE WITNESS: All right.

MS. KRAFT: I also at this time, Judge, wanted to call Agent Sheen for some brief testimony. There were assertions in Mr. Donovan's submission to the Court that I think are factually [30] incorrect, and I wanted to clarify some of those in terms of how they relate to the investigation, and also address the actual—the things that pertain to Mr. Donovan's last line of questioning about things that—other than the real estate market which might affect—which might have affected the value of these properties, such as inflated appraisals. And so I would like to call Agent Sheen at this time.

THE COURT: All right.

AGENT MICHAEL SHEEN, called as a witness, having been first duly sworn, on oath testified as follows:

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Michael Sheen, S-H-E-E-N.

DIRECT EXAMINATION

BY MS. KRAFT:

Q. How are you employed, sir?

A. I'm an Agent for the Federal Bureau of Investigation.

Q. How long have you worked for the F.B.I.?

A. Approximately 7 years.

Q. And can you tell me whether you were the Agent who initiated the investigation which includes the transactions to which the Defendant has pled guilty, has indicated that he was involved in, with regard to mortgage fraud.

A. Correct. Yes, I am.

Q. And did this investigation begin actually in early 2006? Is [31] that correct?

A. Correct.

Q. With the investigation of a person by the name of James Lytle?

A. Correct.

Q. And was Mr. Lytle a mortgage broker?

A. Yes, he was.

Q. And in that capacity he fabricated information in order to allow for the purchase of multiple properties by straw buyers. Would that be a fair way to characterize the overall description of this case?

A. Correct.

Q. And were there in addition—has Mr. Lytle pled guilty and been convicted?

A. Yes, he has.

Q. And he's in prison now, is that right?

A. Correct.

Q. And in addition to Mr. Lytle, were there a total of 9 other people, including Mr. Robers, who were convicted in connection this fraud scheme?

A. Yes, there were.

Q. How many properties were involved in the scheme itself, if you remember?

A. Fifteen. Possibly more—additional properties as well.

Q. And were they all located in Walworth County in fairly close [32] proximity to the subject properties that Mr. Robers is responsible for?

A. Yes, they were.

Q. 900 Inlet Shores, and 911 Grant Street?

A. Correct.

Q. Now I'd like you to focus specifically on 911—excuse me, 900 Inlet Shores, which is the—not the property that Mr. Farmer talked about, but the other property that Mr. Robers is responsible for that's part of the—actually named in the Information to which he pled guilty. How many times was this particular property sold in connection with this fraud scheme?

A. That property was sold twice, essentially.

Q. And who was the original owner of the property at the time that it was first sold?

A. The original property was owned by John Boume-not who was also indicted and charged in this matter.

Q. Okay. He was separately indicated—or excuse me. I think he's pled guilty to an Information and was sentenced in Judge—in another Court, is that correct?

A. Correct. Sorry. Yes.

Q. And so he was complicit in the scheme, is that right?

A. Correct.

Q. Okay. Now, the first time that the 900 Inlet Shores property sold was—is it correct that it sold in January of 2005?

[33] A. Correct.

Q. From Mr. Boumenot to ostensibly Jesus Cerna, is that correct?

A. Yes.

Q. Was Jesus Cerna a real purchaser?

A. He was not.

Q. Who signed the loan documents representing themselves to be Jesus Cerna in that transaction?

A. Mr. Jose Valadez.

Q. And has he also been convicted as part of this fraud scheme?

A. Yes, he has.

Q. He was pretending to be Jesus Cerna, is that correct?

A. Correct.

Q. And was he actually Jose Valadez's brother-in-law?

A. Correct.

Q. And the uncle of Martin Valadez who was one of the other major fraudsters (sic) in this case?

A. Also correct.

Q. At the time that the property was sold from—was transferred from Mr. Boumenot ostensibly to Cerna, was there an appraisal?

A. Yes, there was.

Q. And who conducted the appraisal?

A. The appraisal was done by Alexander & Associates. And subsequent appraisals done by Knutson & Associates.

[34] Q. Now, Alexander & Associates and Tamara Knutson, are those appraisers that were routinely used by the fraudsters (sic) in this case?

A. Yes, they were.

Q. And can you tell me, during the course of your review of the overall evidence that you collected, did the appraisers for Alexander & Associates and Tamara Knutson consistently hit the number that the mortgage broker, Mr. Lytle, was seeking to have the property appraised at? Was it consistent with the sales price that Mr. Lytle had arranged?

A. Correct.

Q. And in the first sale from Mr. Boumenot to Mr. Cerna, what was the appraised value, according to the appraisal? Do you remember?

A. I believe it was a little over $300,000.

Q. Like $304,000? That sound right?

A. 304,000.

Q. Did you have a chance to actually look at any of the public records with respect to the then existing current value of that property?

A. Yes, I did.

Q. I'm handing you what's been marked as Exhibit Number 2 for identification purposes. Can you tell me what that is?

A. That is a tax partial information sheet for this particular property, 900 Inlet Shores, for the year 2004.

[35] Q. So that was for the tax year immediately preceding the January, 2005, sale to—from Mr. Boumenot to Mr. Cerna, is that correct?

A. Correct.

Q. And Walworth County at that time—they didn't value the property at 100—excuse me. They didn't assess the property at 100 percent of the value, is that correct?

A. Correct.

Q. They assessed it at like 75 percent, or something less?

A. Correct.

Q. What does Exhibit Number 2 show that the property was assessed at in 2004, the year before it was transferred from Mr. Boumenot to Mr. Cerna for $300,000?

A. $157,000.

Q. And what did Walworth County estimate to be the fair market value of the property at that time?

A. $206,711.

Q. Almost $100,000 less than what it was appraised by—for by Alexander & Associates, and for what the sale price from Boumenot to Cerna was, is that correct?

A. Correct.

Q. Now, the second sale of this property in terms of the fraud scheme was from Cerna to Mr. Robers, is that correct?

A. Correct.

Q. Do you remember exactly why that occurred?

[36] A. My understanding was that the property needed to be sold because Mr. Cerna became aware of the fraud scheme and confronted Mr. Valadez.

Q. Did he suddenly start to get default notices on a property that he never did anything to purchase?

A. Correct.

Q. So at that point is it true that Mr. Lytle and Martin Valadez made an effort to flip the property, essentially. Transfer it out of Mr. Cerna's name and into somebody else's name?

A. Yes, they did.

Q. And they approached Mr. Robers for that purpose?

A. Correct.

Q. Now, when did the sale from Mr. Cerna to Mr. Robers occur?

A. June of 2005.

Q. So that's about 6 months from the January sale from Boumenot to Cerna?

A. Correct.

Q. And what was the sale price of the property in June of 2005 from Cerna to Boumenot? Or excuse me. Cerna to Robers?

A. $330,000.

Q. Now, you've seen that property, is that correct?

A. Correct.

Q. Are you able to tell us, were there any discernible improvements in that property between the time that it was [37] purchased by Mr. Cerna and the time that it was purchased by Mr. Robers 6 months later?

A. Nothing that I observed.

Q. Is there any explanation for how the property could have gained $30,000 in value in that 6 month period if it wasn't a fraudulently inflated appraisal?

A. No.

Q. Now, let me ask you this. In your experience investigating these kind of cases, what happens to comparables when numerous properties within a circumscribed geographic area are inflated?

A. As the properties in the area are inflated artificially, it continues to inflate other properties. If one property is artificially inflated to $400,000, other properties that base their value off of that property of course rise up as well.

Q. So that the taxing entity, if you will, looks at the sale price to determine what a fair market value is. And if they look around and see numerous properties that have been sold at a certain price, they will then essentially inflate the—artificially inflate the fair market value of those properties, which then can serve as comparables to appraisers who are looking to make—to hit a certain mark, is that correct?

A. Correct.

Q. All right. Now, eventually Mr. —the 900 Inlet Shores property went into foreclosure, is that correct?

A. Correct.

[38] Q. And you had some difficulty ascertaining or locating the final note holder and servicer for this particular loan, didn't you?

A. Yes.

Q. Because it was sold a number of times. Ultimately who did you determine to be the final note holder?

A. American Portfolio.

Q. And are you aware that actually the Government counsel has had numerous conversations with Paul Kessell, who identified himself as the President of American Portfolio?

A. Correct.

Q. And have you also had an opportunity to review some E-mails that were received by the Government from Mr. Kessell?

A. Yes, I have.

Q. Confirming that he was the owner?

A. Correct.

Q. And that he had purchased the note from the original lender, which was M.I.T. Lending?

A. Correct.

Q. And also that at some point in time the property —he had been successful in selling the property and that the property sold for how much?

A. The property then was sold for $164,000.

Q. And were you able to confirm those numbers by examining the public records in this case?

[39] A. Yes, I was.

Q. Okay. Now, do you have Exhibit Number 3 in front of you?

A. Yes, I do.

Q. And can you tell us what Exhibit Number 3 is?

A. Exhibit Number 3 are the public records from 900 Inlet Shores relating to transfer fees paid during the sale of that property.

Q. Okay. And as you researched the—well, what the transfer fee means in the course of your investigation of this. Can you tell us whether or not you determined how a transfer fee relates to a sale of a property?

A. Yes.

Q. How does it relate?

A. The transfer fee—essentially the number paid by the—for the transfer fee, you would divide that by three and multiply it times 1000, and that would be the actual amount of the sale.

Q. And on the document that you have in front of you, Exhibit Number 3, it shows a transfer fee. This relates to the sale of the property by John Boumenot and Marilyn Walsh to Jesus Cerna, is that correct?

A. Correct.

Q. And it says $900 in transfer fee, and then there's a handwritten notation next to it. Whose notation is that?

A. That's my notation.

[40] Q. And it was your indication of what the transfer fee translated into, is that correct?

A. Correct.

Q. Okay. And so the—this reflects that on January 20th of 2005 Boumenot transferred the property to Jesus Cerna for $300,000. Turn to the next page. Does the second page reflect the transfer of the property from Cerna to Robers on June 30th of 2005?

A. Yes, it does.

Q. And what does the transfer fee $990 compute into in terms of the total sale of the property?

A. Total sale is $330,000.

Q. Which is consistent with all of the loan documents that you obtained in the course of this investigation, is that correct?

A. Correct.

Q. Then there are two other—then there's a page that shows Benjamin Robers as the owner, and mailing address for this property. And then after that there are two—well, there's a document that transfers the property from—on 2/21/06 from the Walworth County Sheriff to Merrill Lynch Mortgage Lending. Is that the transfer that occurred after the foreclosure?

A. Correct.

Q. And to the best of your knowledge was Merrill Lynch Mortgage Lending at that point the servicer for that loan?

A. Yes, they were.

[41] Q. And it shows no transfer fee. What does that mean?

A. Transfer fees are not normally—would indicate that there was no actual transaction that occurred. Essentially it goes back to the lender.

Q. Because the property didn't really sell at the Sheriff's sale. It was acquired by the lender, is that correct?

A. Correct.

Q. And then the next page on 10/2 of 2008 shows another grant from Merrill Lynch to South Star (phonetic) again for a zero transfer fee, is that correct?

A. Correct.

Q. And then finally we have on the last page a transfer from South Star to Dorian Frazier (phonetic) for the amount of $492. What does that—on October 6th of 2008. What does that transfer into?

A. That would be a sale of $164,000.

Q. Okay. And is that consistent with the number that Mr. Kessell provided from American Portfolio about the amount of the sale for that property?

A. Correct.

Q. And are those the dates that he indicated the property was disposed of on his behalf?

A. Correct.

MS. KRAFT: I don't think I have anymore questions about this. I do want to elaborate a little bit during my [42] argument, but I don't have anymore questions for Agent Sheen at this point.

THE COURT: Any cross examination?

MR. DONOVAN: Thank you.

CROSS EXAMINATION

BY MR. DONOVAN:

Q. Do you know who the first lender was for this property? This 900 Inlet Shores Drive?

A. The first owner at the beginning of the scheme? Or prior to?

Q. After the mortgage was issued with Mr. Robers' name on it, who was that lender?

A. After?

Q. Yes. After Mr. Robers submitted his loan applications and went through the closing, who was the first lender on that transaction?

A. I don't have that in front of me. I'm not certain who the actual initial lender was.

Q. But you know that the loan amount was for 330,000?

A. Correct.

Q. Now, the loan was bought and sold several times, is that correct?

A. Correct.

Q. Do you know who the second lender was?

A. I do not.

[43] Q. Do you know what they bought the loan for?

A. I do not.

Q. Do you know if it was for the full value?

A. I do not.

Q. So you don't know if the second lender reimbursed the first lender for the full amount?

A. Correct.

Q. Do you know who any of the other lenders were in the trail?

A. The eventual final owner of the—of the loan was M.I.T., who then sold it to American Portfolio.

Q. Do you know what M.I.T. bought the loan for?

A. That I do not know.

Q. And so you don't know, then, what American Portfolio eventually bought it for?

A. They purchased it for $330,000.

Q. So they did pay the full amount?

A. Correct.

Q. So in your experience, then, doesn't that most likely mean that all the previous lenders probably paid the full amount, too? I mean, is there any reason American Portfolio would have, you know, bought a loan that they know has been in foreclosure and it's been in default for the full value of—

A. Correct.

Q. Now, when you went to review these public documents, where did you obtain them from?

[44] A. They're accessible either by going to court, or just via the internet.

Q. Now, isn't it true that at the top of these it says this is not official information. All official information is recorded in the Land Information Office?

A. Correct.

Q. Did you actually go to the Land Information Office for Walworth County? Or just rely on these?

A. For these particular documents, these were printed online, and we obtained judgment records from the County directly.

Q. So how do you know, for example, that these documents relate specifically to 900 Inlet Shores Drive?

A. Based off the parcel number. Each piece of property has a parcel number, also known as a tax pin number, that identifies a piece of property. Referred to Exhibit 3, parcel number is FA333500001. That refers to 900 Inlet Shores.

Q. How did you link up the parcel number and the address?

A. The parcel number to the address, again, is available on the internet from Walworth County's website as far as linking the pin number to the address.

Q. All right. And how about figuring out this transfer fee formula? How did you determine that's how you extrapolate the purchase price?

A. That's how Walworth County—their procedure for coming up with their transfer—again, it's a link available on their [45] internet site. Or just upon talking to Walworth County personnel.

Q. So it's safe to say almost all of this was determined by just looking at online records. You didn't actually go and pull the records yourself. The original documents that showed, you know, what these different transfers were, and for how much?

A. Actually, no, I did basically both. Using the internet and going to Walworth County.

Q. Okay. Now, you testified earlier that—I believe the question was along the lines of the appraisers consistently came up with the number, I guess, or whatever that Lytle wanted. Is that accurate?

A. Correct.

Q. Now, were any of the appraisers charged in this scheme?

A. They were not.

Q. And isn't it accurate to say that throughout the discovery in this case there was indications that these appraisals were legitimate?

A. The appraisals—from what we could determine, the appraisals were requested by Mr. Lytle and some of his associates. Essentially the appraisers would hit those numbers as presented by Mr. Lytle in order to continue their business. And again, essentially those numbers were—whatever Jim wanted those numbers to be, they would hit those numbers.

Q. Did you interview the appraisers in this scheme —

[46] A.—yes, we did—

Q.—and ask them about whether they inflated their numbers or not?

A. Sorry about that. Yes.

Q. What did they say?

A. They denied any involvement.

Q. And, in fact, did you ask Jim Lytle about whether he asked them to inflate numbers or not?

A. Yes, we did.

Q. And what did he say?

A. He said that he did not ask them to.

Q. Bradley Hollister was another individual involved in this scheme, correct?

A. Correct.

Q. And he basically worked with Lytle to help plan and execute this scheme and recruit people in?

A. Correct.

Q. And I think you also asked him about whether these were false appraisals or not, correct?

A. Correct.

Q. And just with your general background and familiarity with working with these types of cases, is it safe to say that the real estate market back in 2004, 2005, was booming and prices were generally rising across the board?

A. That would be my experience.

[47] Q. So, for example, when you testified earlier that the house sold for $300,000, and then 6 months later when Mr. Robers submitted his application, sold for 330,000, it's possible that that 30,000 could have reflected an increase in market value, correct?

A. It's possible.

Q. How many loan payments were made before it went into default? Do you know?

A. That I do not know. I don't believe they were—I'm not certain.

Q. Do you know when the first default was? Or when the first missed payment was?

A. I do not.

Q. And then when was the foreclosure judgment?

A. I don't have the judgment in front of me. It was foreclosed in February of 2006.

Q. So just—so actually less than a year after—I mean, you said Mr. Robers got the loan in June of '05, is that correct?

A. Mr. Robers got it in June of '05, correct.

Q. And then do you know when the Sheriff's sale was?

A. The eventual—I should say the Sheriff's sale was February of 2006.

Q. And then do you know, again, who the lender was at that time? Was it the original lender? Or was it a different lender?

[48] A. The servicer was Merrill Lynch.

Q. So it's possible that the first lender was—got all the money back and suffered no loss, is that correct?

A. I'm sorry? The—

Q. It's possible that the first lender sold the loan for the full amount and got all the money back, is that right?

A. Correct.

Q. And so, therefore, suffered no loss?

A. Correct.

Q. And we know that the last lender, which is American Portfolio, we know that they bought the loan for the full amount. And again, so we can assume that all the other lenders before them, whether it was two or four, got their money back, correct? So there's no loss?

A. I don't know if I can say that. I can assume that. But possibly. Seems logical.

Q. Now, American Portfolio buys this loan after default, after foreclosure. So they buy it knowing that it's already defaulted and been foreclosed on, correct?

A. I believe so.

Q. So, do you know, was there an appraisal done on the property at the time of the Sheriff's sale? Do we know what the house was worth at that point in time?

A. What—the value of the house? I do not.

Q. So it could have gone up again. It could have been higher [49] than it was when Mr. Robers bought it. It could have been lower. We don't know. Is that safe to say?

A. The eventual—I guess I would base that on the eventual sale of the property from the lender off to the Fraziers of $164,000.

Q. But this is a couple years down the road. I mean, this is in October of 2008 that the Fraziers—

A. Correct.

Q. And so again, based on your experience and knowledge of the real estate market, this is kind of after the bubble breaks, so-to-speak, right?

A. It was a later date and time, so—

Q. So again, safe to say—and correct me if I'm wrong—we don't know the difference between the value of—or I'm sorry, we don't know the difference between the Sheriff's sale price and what the fair market value might have been in February of 2006?

A. Ultimately with the Sheriff's sale they chose not to sell that property, because no one would bid on that particular property to bring it up to the loan amount of $330,000.

Q. Well, correct me if I'm wrong. They don't have to sell it at a Sheriff's sale, right?

A. Correct.

Q. They can hold onto the property once they regain title, correct?

[50] A. Correct.

Q. And they could, for example, try to see if it's going to appreciate. They could retain a commercial broker and try to sell it for a higher price?

A. Correct.

Q. So they make the decision, and it's common, in fact, for lenders to basically bid on the property and get it back at the Sheriff's sale?

A. Correct.

Q. And again, based on your knowledge and experience working in this area, isn't it common for lenders to do so, basically, to get the loan off their books? They just want to cut their losses and move on.

A. That would be up to the individual company, but it does occur, correct.

Q. Again—right. But in your experience you've seen that happen relatively frequently, correct?

A. Correct.

Q. So in that case, in such a situation, the lender could try to sell the property for higher or do different things, but they're basically cutting their loss?

A. Correct.

Q. And, in fact, in reviewing the foreclosure documents, which you said you did at the loan office, did the lender in this case waive his right to a deficiency against Mr. Robers in the [51] foreclosure proceeding?

A. That I don't know.

Q. You don't recall?

A. I can't recall.

Q. Are you a certified appraiser?

A. No, I'm not.

Q. So you're not able to necessarily know what a house is worth at any given time, is that correct?

A. Correct.

Q. So when you testified earlier about there's nothing between the sale to Cerna and the sale to Robers justifying the $30,000 increase, you don't have expertise to necessarily confirm that, correct?

A. Correct.

Q. Now, as far as Exhibit 2, which is the Exhibit the Government submitted as far as what Walworth County assessed it at in 2004—again, your knowledge and experience, does the tax assessed value always equal the fair market value?

A. As far as the assessed value? The assessed value is 75 percent of what Walworth County is saying is the fair market value, essentially.

Q. So then even according to Walworth County the property is worth more than $206,000 at that point?

A. No.

Q. Or they're saying it's worth 150,000?

[52] A. They're saying the value is worth $206,000.

Q. Okay. What's does the assessment ratio mean? What does that do?

A. Essentially 75 percent is the assessment ratio. That's the number that they multiply the fair market value by in order to come up with the assessed—what they assessed it at.

Q. For tax purposes?

A. Correct.

Q. Again, my question is does a house always sell for what Walworth County assesses it for?

A. No.

Q. So the fair market value on the tax assessment does not necessarily equal the fair market value in real life when the property is going to be sold?

A. Correct.

Q. And again, there can be a wild variation depending on different factors, including the real estate market?

A. Correct.

Q. Do you know, when these loans are bought and sold for the different companies throughout this process, whether they're bought in packages? Or individually?

A. That I don't know.

Q. Do you know, again, when it's bought whether it's for prospective investment and they're bought to, you know, later re-package and sell it to another company down the road?

[53] A. I don't know that.

Q. Do you know that each lender discloses to the next one that they're selling to that the loan is in default or in foreclosure?

A. I don't know if they disclose that or not, necessarily.

Q. And again, you don't know if the lender—any given lender at any time is necessarily doing anything to mitigate the loss, or to try to sell the property at a higher value. You really don't know what the purpose is of these multiple sales of the loan, correct?

A. Correct.

Q. Now, I guess—I have some questions about the other property, which I know Mr. Farmer testified to. But again, the same question here. You don't know what—you know, potentially led to the difference between the ultimate sale price, and what they bought the loan for, is that correct?

A. Correct.

MR. DONOVAN: I have no further questions.

MS. KRAFT: I just have a couple of things as a point of clarification.

REDIRECT EXAMINATION

BY MS. KRAFT:

Q. I'm going to show you a document—I don't have it marked as an Exhibit. I have some notes on it, which are my notes, so I just want you to look at the top portion of it. Tell me if [54] you recognize it.

A. Yes, I do.

Q. Tell me what you recognize it to be.

A. This would be a letter from Paul Kessell, the President of American Portfolio.

Q. Okay. And it's an E-mail, is that correct?

A. Correct.

Q. And have you seen that before today?

A. Yes, I have.

Q. And when you look at it can you tell me whether or not, after you reviewed it, it refreshes your recollection about whether or not there were multiple owners of the note between the original lender, M.I.T.,

and American Portfolio. Just read it to yourself. And then I want you to tell me whether or not it refreshes your recollection about that.

A. (Witness so responds.) Okay. I've been refreshed.

Q. Okay. Can you tell me whether or not, based on your review of that, you know was there anyone who owned the note in-between M.I.T., the original lender, and American Portfolio?

A. There was not.

Q. Can you tell me whether or not you are able to determine when it is that American Portfolio acquired the note from M.I.T.?

A. Yes.

Q. When?

[55] A. December 29th, 2005.

Q. And was that before or after the foreclosure judgment?

A. That was before.

Q. And are you able to tell us for what price American Portfolio acquired the loan from the original lender, M.I.T.?

A. Yes, I am.

Q. And for what price was that?

A. $330,000.

Q. Which was the original amount of the mortgage, is that correct?

A. Correct.

Q. And are you also able to tell me what day the property was disposed of, according to Paul Kessell from American Portfolio?

A. Yes, I am.

Q. What date was that?

A. October 6th, 2008.

Q. And is that consistent with the public record search that you did with respect to that—consistent with the sale of the property to the Fraziers?

A. Yes, it is.

Q. And can you tell me for what price Mr. Kessell indicated the property to have been sold?

A. $164,000.

Q. Which is also consistent with your public record search, is that correct?

[56] A. Correct.

MS. KRAFT: That's all.

THE COURT: Any further questions?

RECROSS EXAMINATION

BY MR. DONOVAN:

Q. So I just want to be clear. So you refreshed your recollection based on the E-mail that you were just shown, that there were no other—there were no other sales of the loan other than from M.I.T. to American Portfolio prior to the foreclosure, is that right?

A. Correct.

Q. So any other purchase or exchange of loan after the foreclosure and before the sale in October of 2008.

A. Correct.

Q. And again, you don't know if any of those lenders necessarily knew that the property was in foreclosure or not. We don't know what they were told, or why they bought it. Is that fair to say?

A. Correct.

MS. KRAFT: Isn't it true that there were no other purchasers?

THE WITNESS: Correct.

MR. DONOVAN:

Q. I'm sorry. I thought there was a South Star involved at some point. Do you know who that company is?

[57] A. South Star is a subsidy of Merrill Lynch, we believe. And Merrill Lynch was the servicer.

Q. And the property was transferred to them, even though it was for a short amount of time, correct? I'm looking on the—I guess fifth page of Exhibit 3. Conveyed to South Star on October 2nd, 2008.

A. My recollection, I believe that Merrill Lynch is acting as the servicer of that loan, not the actual owner of that loan.

Q. Right. But—well, Merrill Lynch is listed as the grantor. So that means they would have been holding the property, right?

A. Not necessarily. I can't recall specifically if they were acting as a servicer or the owner of that property at that point.

Q. Well, could a servicer transfer the property?

A. Yes.

Q. On behalf of the person or the entity who actually owns it?

A. Correct.

Q. So you think that Merrill Lynch granted it from itself to South Star, and then South Star 4 days later then sold it to the Fraziers?

A. Correct.

Q. Do you know why South Star would have held it for four days?

A. Why they would have—sorry, I don't know. No.

Q. And you don't know what they would have bought it for, or why they would have bought it, or why it would have been [58] conveyed to them?

A. Why the Fraziers bought it? I don't know.

Q. No, I'm sorry. Why would it have been conveyed to South Star? You don't know?

A. Why would it have been—I'm sorry?

Q. Do you know why it would have been conveyed to South Star for 4 days?

A. Essentially as a quitclaim deed, it is my recollection that essentially they would transfer it over to them for some sort of administrative reason. But I don't know.

Q. Okay. I have no other questions.

MS. KRAFT: I have nothing else.

THE COURT: All right. You may step down, Agent Sheen. Thank you. Any additional testimony?

MS. KRAFT: That's all from the Government, Your Honor.

THE COURT: The Court will receive them.

MS. KRAFT: I'm sorry?

THE WITNESS: You offered the Exhibits, did you say?

MS. KRAFT: Yes. I'm sorry. I would offer Exhibit Number 1, 2, and 3. And I would like them made part of the record. I believe the Court has them all.

THE COURT: I do.

MR. DONOVAN: No objection.

THE COURT: Since we're talking about the original —[59] or the first, I should say, objection to the presentence report, which is Paragraph 19, and the amount of—level increase because of the loss, is there any additional argument? We just heard testimony. Is there any additional argument on this particular issue?

MR. DONOVAN: Not from Mr. Robers.

MS. KRAFT: Paragraph 19 I think is—I think he's correct. I think that there's a difference between—I think—okay. In calculating the guideline loss—and I think that's different than the restitution loss—I think that their guidelines envision the difference between the loan and the resale of the property. Not the amount of the loan and the —I need to re-read this.

Right. I believe that in the original PSR, the PSR writer held Mr. Robers responsible for the full amount of the loan under the theory that he intended the entire loss of the $330,000. And I believe that the guidelines envision that the value of—where property is involved, where there's collateral, that will be—that the original loss will be mitigated, will be reduced by the value of the collateral.

And so in terms of the level of—the increase in the guideline level, I think that the Court needs to consider the difference between the original note and the ultimate sale of the property, as opposed to the amount of the original notes.

Originally when I started doing these cases I took the [60] same position that the Probation Department has taken. I took the position that where somebody took a loan and never intended to pay it at all, they really intended that the entire loss of the note occur. Or the loan occur. But I think that ignores the fact that the property that secures it, the collateral, has some value.

So I think that with respect to Page 5, objection—Paragraph 19, the Defendant is correct. And I think that the correct guideline calculation is that that we have basically agreed in the Plea Agreement, which I think actually was corrected. I think I started him out at 7, and really should start out at 6. But I think that's different from the restitution argument that we are having—that we're having today. If that makes sense.

THE COURT: Well, it does. You're in effect agreeing with the defense on this objection.

MS. KRAFT: Yes. And I think I said that in my—in my response that I wrote on November 1st. And again, I apologize for not being able to obtain—to respond sooner on that one. I was out of town and didn't get back until October—excuse me, November 1st, and filed my response on that day.

THE COURT: Then we have Paragraph 29, Page 6, which objects to the criminal history point. Any additional argument on that point?

[61] MR. DONOVAN: Not from Mr. Robers.

MS. KRAFT: I think that it does count. I think it counts because even if it's an ordinance violation, if it's an offense that's also a State criminal crime, it counts. And so I don't have any specific independent knowledge about the underlying facts. But I think Ms. Vodak is correct in counting it towards his criminal history.

THE COURT: Well—and the Court agrees with Probation on this, that the parallel offense on the State level according to the Guidelines would require that assessment. So the Court will overrule that objection. The Court would inquire as to whether or not there's going to be additional argument now relative to the restitution.

MS. KRAFT: I guess I would like to just—to sort of summarize what we have here—

THE COURT: —all right—

MS. KRAFT: —and make some argument. In this case, the Government has sought restitution for the two properties in a different way. American Portfolio was the note holder. Purchased the note on December 29th of 2005, from M.I.T., which all the discovery material shows to have been the original lender. American Portfolio claimed a loss on the note. Indicated to Government counsel that the property was sold on October 6th of 2008 for $164,000. I believe that actually American Portfolio is entitled to more restitution than the [62] difference. The problem was when Mr. Boumenot was about to be sentenced, Mr. Kessell, after repeated promises to provide a breakdown of his other expenses, failed to do that. And ultimately in determining that we needed to finalize the Boumenot restitution order, this is the amount that we agreed

on. The difference between the sale price, and the original loan. And so that amount exists in other judgments. I think it's really more than fair, because in reality I believe that the Defendant ought to be responsible for other costs beyond the $166,000 loss. But because we weren't able to get more definitive figures, that's what we were left with, and that's what we proposed to the Court, and that's what the Court accepted in Mr. Boumenot's case, and I think it's fair in Mr. Robers' case.

I don't understand this business of well, the real estate market is really the culprit for making the property decline. This was an inflated property. Just looking at the prior year's tax records it's pretty clear that there's no way that it was worth 300,000, let alone 330,000 at the time that the Defendant pretended that he was going to acquire this property for himself. It just wasn't a property that had that kind of value.

And what Agent—well, actually I think what Mr. Farmer was saying, and maybe I asked Mr. Sheen this as well, what—unfortunately what happens in these fraud cases, [63] particularly one like this where there's multiple properties that are sold at inflated prices in a particular area, it artificially inflates the entire area. And so to the extent that there was any legitimacy to these appraisals—which I don't think there was—but even if there was, it was the product of the other ongoing fraud that was occurring as a result of Mr. Lytle's conduct and those who were acting with him. I just don't think that there's any basis to say that Mr. Robers should be held responsible for something less than $166,000 on this loan.

The other—the other property, 911 Grant Street, I made my legal analysis in the memorandum that I filed on Saturday. I think that—I mean, I think it's not

crystal clear as to what can be—what are consequential damages, and what are direct damages of loss. Of a fraud loss. But I think that to the extent that the victim or the person who stands in the shoes of the victim is trying to mitigate those losses, is trying to prevent the property from losing value and trying to make the loss as small as possible, that those expenses that are incurred in the course of doing that really have to count. And I think that some of the more recent law on this area suggests that that's true.

I would suggest to you that—to the Court that a consequential damage would be if the lender as a result of lending this didn't have money to make other loans. And so lost [64] business. That would be a consequential damage. But anything that flows directly from the fraud itself really ought to be compensable as restitution losses. And I think that it's really, really fair to hold the Defendant responsible for those losses that Mr. Farmer has claimed on behalf of M.G.I.C. that total $52,952.18.

He needn't have done anything, and the loss would have been $159,214.91, and then perhaps the property would have gone into decline and the City of Lake Geneva would have been stuck with it, and the taxpayers would have been stuck with a declining, decaying property, in a neighborhood that nobody was taking responsibility for. And that has happened a number of times in Milwaukee where lenders have just walked away from properties and left them to the neighborhoods and the cities to deal with.

I think that all the evidence in this case—and again, it's by a preponderance of the evidence that the Government has to establish that these losses occurred. And that—I think that I—some of Mr. Donovan's questions were like well, Mr. Farmer, you didn't, you know,

look at these numbers yourself. But he analyzed the file, looked at the business records that he had, and he came up with the—I think reasonable loss claims in this case. And I think that we established sufficient evidence to support the $52,952.18 claim. So I would ask the Court to order total restitution, which [65] includes the 166,000, and the $52,952.18.

THE COURT: Okay. Mr. Donovan.

MR. DONOVAN: Thank you. And I will respond to the Government's arguments as far as what's a direct versus consequential loss. But I want to first begin by proposing that the Court impose a lesser amount of restitution regardless, pursuant to 18 U.S.C. 3664(h). And also *United States vs. Sensmeier*. And I'm not going to repeat my argument. I laid this out in my restitution memorandum. But this Court does have the discretion, which would be reviewed on appeal for an abuse of its discretion, to a portion, a lesser amount of restitution when there's more than one Defendant that's liable for the loss. And again, for the reasons I laid out in my memo, I feel that Mr. Robers should not be held responsible for the full amount of the restitution for two main reasons.

Number one, he is I think by all accounts, including the Government and the Probation Office, the least involved in this offense. It's clear that he had nothing to do with planning, or inventing, or executing, other than his limited involvement in this scheme. He was clearly approached, and he was approached by Bradley Hollister, who he worked for. And I think Bradley Hollister, when he approached Mr. Robers, knew this would be an individual that he could get to offer a small amount of money, and to act as a straw buyer.

Now, again, I'm not taking away from his [66] responsibility. We're not suggesting that he did not commit a crime. He did. He committed wire fraud. And he, you know, submitted false statements to the bank as to his income, and assets, and intent to occupy in order to get a loan. But it's clear that this—you know, that he was convenient for the leaders of this scheme. And if it wouldn't have been Mr. Robers, it would have been somebody else. He was by no means integral to this scheme. I think at one point the Government in its PSR response said that he was integral. I think he's far from it. I think Mr. Robers was convenient. So his reduced culpability in this very small role in this offense I think would warrant apportioning him a smaller amount of the restitution than the others.

The other reason that the Court can consider a smaller amount for him is his economic circumstances. And Mr. Robers, as is made clear in the PSR, is a farmer. He helps around his father's farm. It's been in their family for generations. The PSR, paragraph 53, reports that Mr. Robers' positive monthly cash flow is $199. And I don't think that the Government would contest that. He has an H.S.E.D. I don't think that there's any realistic possibility that he's going to be getting a higher paying job in the near future.

He has expressed to me, and expressed to the presentence writer, that he wants to continue to run the family farm. He wants to keep it in the family when his Dad is no [67] longer able to handle it. And I think it's pretty clear that Mr. Robers will never be able to anywhere near pay a portion of, you, know, 200-some Thousand Dollars of restitution. And so I feel between his role in the offense, and between his economic resources, that this Court could, in its sound discretion, order a smaller amount. And the amount I

propose is one half of his monthly take-home of $100 a month, over the course of 4 years of probation. So that would be about $4,800. This reflects an amount that's greater than what he profited from, and I think by all accounts he made at most $1,000. And the PSR reports that out of that $1,000 he used it to buy lawnmowers for a business that he wanted to start. So it's greater than that amount, but it also is much less than the overall amount and reflects his culpability, and reflects his economic resources.

Now, if the Court elects not to apportion the restitution, I do have issues with the methods and the theories proposed by the Government for why he should be on the hook for the full amount. The case law is very confusing on this. It's not clear. We know that restitution should only be made to cover direct losses, and not be made to cover consequential or incidental damages. That's one thing that I think the Seventh Circuit case law makes clear. They talk about how restitution is no synonym for common law damages. They talk about how it would complicate criminal sentencing unduly and unnecessarily because the victim, who has a shot at collecting common law [68] damages, can bring a tort suit. And that's exactly what's happened here. You know, this has complicated this sentencing and it's unnecessary, I think, to go through this. The fact is that these lenders did pursue civil process. They foreclosed—the lender on Inlet Shores, foreclosed on the property. Got it back through a Sheriff's sale. They waived deficiency in that Sheriff's sale, if the Court would review the documents. But they're now trying to collect on their losses through Mr. Robers and other individuals. I don't think it's clear that his crime, committing wire fraud by false pretenses, for the purpose of executing a scheme is what led to the losses in this case. I think what led to

the losses is the real estate market. The F.B.I. Agent testified that this was a booming market at the time. That the property values were up pretty much across the board. And so that if there is a decline in value, it could have been due to that. And I think that Mr. Farmer also testified to a similar extent. It's hard to say what causes the loss.

The Government talks about how, you know, these schemes artificially inflate prices in a geographic area. Well, back in 2004, 2005, up through 2008, every house price was artificially inflated across the board. And I don't think you can pinpoint again Mr. Robers' specific crime as the cause for this.

The Government also makes assertions that these were, [69] in fact, false appraisals. But in fact that's not borne out in discovery. And I think the F.B.I. Agent basically said on the stand the appraiser said that they were legitimate prices. The leaders of this scheme said that they were legitimate prices. And these statements were made in the context of a debrief, further admitting criminal liability. So I don't know why they would say that the appraisal's accurate, when it's really not. The Agent said that he's no expert himself in appraising how much a house is worth. I don't think tying this to the fair market value that Walworth County puts on it is a legitimate way to do it, because what houses sell for is not always what the fair market value is on the tax assessment. So I don't think that there is reliable information here, or enough reliability for the Court to make a decision that the loss was due purely to the wire fraud.

As far as the losses claimed by M.G.I.C., I really have issues with several line items on that. There is clear case law—and I'm looking at one of the cases that the Government cited, the Arvanitis (phonetic) case, I

believe, which does state clearly that attorney's fees aren't recoverable. So I think that line item is not legitimate.

I'm not clear on the property taxes and hazard insurance. I mean, that's something that the lenders elected to advance to keep the property from having, I guess, liens on it. I just feel that a lot of these line items submitted by M.G.I.C. [70] are consequential damages and not a direct cause by the fraud.

I also did review the Government's memorandum, since it was submitted on Saturday, and I feel a lot of the cases it relies upon supposedly for these propositions are very factually distinguishable from this particular case. *United States vs. Shepard* dealt with an interest bearing account that's not backed by collateral, as it was in this case. The *Milwaukee vs. Cement Division of National Gypsum Company* was a maritime collision case which, as far as I could tell, was an admiralty case that had nothing to do with criminal restitution. We have the Hosking case, which was an embezzlement case, where money was directly embezzled out of I believe investment accounts. We have the Adcock case, where—this involved a Defendant who basically bilked the Government out of contracts—the money the Government paid far exceeded the value of the services rendered. Again, no collateral involved. Then we have the Rhodes case, which dealt with stealing investors' money out of an investment account.

So I feel that a lot of the cases the Government relies upon to allow these consequential damages, they don't stand for these propositions and they're very factually distinguishable anyway from this case.

I think in this case, again, what the victims want is they want the Defendant on the hook for bad investment choices, and I think that they want to try to get them off the hook for [71] the declining real estate market, and for their decision how and when to dispose of the property. Which, again, in both cases was up to the lender once they reclaimed title through the foreclosure process.

So I think these are damages that should be recovered civilly, if at all. I don't think it's proper for criminal restitution, and I would ask the Court not to impose that amount, and impose the amount that I advanced in my memo.

I do also have other sentencing arguments, not related to restitution. I don't know if the Court wants to hear those now, or after the Court rules on restitution.

THE COURT: No, the Court has to rule on the restitution while we're discussing it. So we can take up the rest of the matters later. Anything else on this from the Government? Any other response from the Government to the first argument?

MS. KRAFT: Well, I—you know, really would stand on the legal analysis that I made in my memorandum. But I guess just briefly in response to counsel, this was fraud. This was—I mean, to attribute this to the falling real estate market ignores the fact that he signed mortgage loans. Promised to pay mortgage notes on properties that he never intended to own, and didn't ever make a single payment. He contributed to this fraud as much as anybody else. Yes, he had a smaller part in the overall aspect of it, but it was still fraud. If he [72] hadn't done that, he wouldn't be here today facing the music for these offenses. He's lucky that there was collateral involved, because the

collateral, to the degree it has value, reduces the amount that he was responsible for in these transactions that he never intended to make good on. And I just don't see how you can argue—how counsel can argue that somehow he shouldn't be responsible for making any restitution to these lenders. That, in fact, if they want to go after him civilly, they should go ahead and have at him. But that he doesn't have any criminal liability for the restitution.

I would ask the Court to order the restitution in the amount that's been requested, the 166,000 for American Portfolio, the $52,952.18 to M.G.I.C., for a total of $218,952.18. I think it should be joint and severally responsible. I recognize that he didn't have the—necessarily the same role that the other actors did, but nonetheless I think that the Statute calls for him to be made fully responsible, and he should be.

THE COURT: All right. Anything else on this?

MR. DONOVAN: No, Your Honor.

THE COURT: Well, the Court has to look at—I'm going to start out with the remarks—start off with the first argument first, that the Defendant was a lesser participant, least involved, et cetera. And, therefore, should not be responsible for these amount of losses. But the Defendant is [73] responsible for the two properties that we're talking about, the Grant Street property, and the Inlet Shores property. And so that's what we're dealing with. And those are the amounts that we have to attribute to the Defendant. Without his participation, these properties wouldn't have been sold to these victims in the fashion that they were. Or those victims wouldn't have been involved in the fashion that they were as far as being lenders. And in the case of M.G.I.C., Mortgage Guarantee Insurance

Corporation, guarantors of lenders' defaults. So the Court is not going to accept that. And also, the Court has never made an exception for economic circumstances. I've sentenced inner city bank robbers who have never made a dime in their life, and still are ordered to pay restitution in an amount that will probably never be repaid. But that was the right of the victim under the act, and the Court imposed that obligation upon those types of Defendants. And that was in spite of their economic circumstances.

Now, as to the exact amounts here, pick up with the same thing I started out with relative to the first Defendant's argument. The Defendant is being held responsible for two properties. Those are the Inlet Shores property, and the Grant Street property. We had the original appraisal at 330,000, and 141,000, and we wind up after—as the Court has found from the testimony of Mr. Farmer, the processes that were involved, that resulted in a loss ultimately of 52 thousand-something dollars [74] because of the various—and the Court will get to these—the various expenses incurred, and then the sales price ultimately that it brought, and then brokers' commissions and all of that.

The argument is made that—and I'll take up the M.G.I.C. case first because it involves the issue of consequential and direct damages and those other factors that the Court has to take into account according to the Seventh Circuit case law. But the Seventh Circuit—the Court has just made a ruling on this case in the savings and loan fraud case in which the Court awarded damages for investigation done by —and the audits that were—costs involved in investigating and auditing the losses and the processes that went on after the bank frauds were discovered. And the Court

cited the recent case of *United States vs. Hosking*. And I think that the Hosking case is indicative of—although the case law is not, as Mr. Donovan has argued, really direct. It's somewhat confusing between what are direct and consequential damages. And a variety of cases involving a variety of facts, involve different results, by different Courts, different panels. The trend is, I think—and the thrust of Seventh Circuit case law, and the thread that runs is becoming stronger in this fabric, is that these expenses aren't going to be considered as consequential. Or, rather, as opposed to consequential or direct. They're going to be called related offenses. And it's built into the logic of this situation. As the Government has argued, these [75] are fraud cases. It was a fraud that was perpetrated, which resulted in all of these actions that had to be taken but for the fraud. And that it's not putting a person, a victim in this type of case, in a better place. It's putting a victim back where that victim never should have gone and never would have been but for the conduct that was conducted by the Defendant.

And there's no doubt that the market went down this past number of years. And we all know that that market was inflated. The market was inflated because in large measure not only—and I'm not going to get into macroeconomic arguments here, but because of the availability of money. But even with the easy availability of money, and the—call them negligent lending practices—a lot of it was involved with—as we see with Countrywide. And Countrywide indeed and in fact was the servicer of the M.G.I.C. property, as the Court recalls. There was a lot of direct fraud as was perpetrated here. And I think that outweighed any initial risk assessments, any negligent risk assess-

ments that were gone on here. It was just easy pickings for people who just decided to take those easy pickings. And the appraisals that were done were inflated appraisals. There's no doubt about it. I accept the argument made by the Government that inflated appraisals lead to inflated comparables because of the nature of the process. They also have appraisers who, while not being criminal in orientation, are more than willing with easy money to neglect their duty and give the appraisal that the [76] mortgage broker is asking for. And I deem it to be the case in this case, as I deemed it to be in the Bradley Hollister case. And Judge Adelman has come to the same conclusion, calculating those amounts in these different or other properties. But calculating the amounts and not accepting the positions that are argued here today.

So consistent with the logic of it, I think the logic is overwhelming. That the fraud was committed. The victim is owed, and he's owed the direct expenses—I'll call them the direct expenses that flow from the fraud that would not have existed or not there—never would have been there.

The market argument, as the Court has indicated, was dealt with in this manner as already indicated. And that is that the Defendant was part of that process that led to—in large measure, to an inflated market. Even if that isn't the case, if we had—never had a sale, we never had the fraudulent conduct, we may still have the property at 900 Inlet Shores or 911 Grant Street that would be undervalued, maybe under water, but there never would have been a foreclosure because the party responsible, the honest party responsible—and indeed in this one case we had a person who probably could have held this property. I forgot which one it was. Involving the fellow who didn't

even know he purchased the property. I guess that was the Jesus case, or Cerna case, or whatever. But the Court finds that the victims in this case, M.G.I.C., and the American [77] Portfolio—I think that's Tom Dallman, is entitled to the amounts that are requested. And so the Court is going to set the restitution amount at $218,000 and whatever else it worked out to. Was it 952.18 or something like that?

MS. VODAK: Yes, sir.

THE COURT: Now the Court will listen to arguments as to whether or not I should send Mr. Robers to jail, or place him on probation, or whatever. And the Court will listen to the Government first as to its recommendation, and then the defense. Is the Government going to make a recommendation here?

MS. KRAFT: I am, Judge. And I agreed in the Plea Agreement, and I think it's appropriate, that I would recommend that Mr. Robers be put on probation. I think it's particularly fair that the Court consider that option. I realize that the guidelines call for a sentence of 12 to 18 months, but quite frankly, Bradley Hollister, who was involved in this scheme, who was involved with other properties besides those that the Defendant was involved in, and who was involved with one of the properties that the Defendant was involved with, was sentenced to a term of probation.

Now, I recognize that he was a cooperator, and that's the reason that I recommended that sentence for him, but I also can tell the Court that others who were similarly situated to Mr. Robers have received probation terms. I don't think that he has—this was a serious offense. I don't in any way, or [78] shape, or form, mean to suggest that it wasn't. And that I don't take very seriously the fact that he was an integral

part of this fraud scheme. But I think that overall, given his role in the offense, and I think overall given his background, that it's unlikely that he's going to become involved in offenses like this in the future.

I also think it's important for him to be working, to be contributing to the restitution that is due in this case. And so I would, consistent with my promise in the Plea Agreement, recommend that he be placed on probation for a lengthy period of time, actually, so that he can work towards making that restitution.

THE COURT: All right. Mr. Donovan.

MR. DONOVAN: Thank you, Judge. I believe I already covered what my view is of his role in the offense when we talked about restitution. I agree that probation would be appropriate. He was very minimally involved, at least compared to the other participants. I think the Court touched upon the fact, too, that these were at least negligent lending practices, if not questionable themselves. So I think this is—needs to be evaluated in the context of the market as a whole back at this time. Now, again, it doesn't excuse his actions. He did commit a fraud. He's pled guilty. He's not backing away from, you know, accepting responsibility in this case.

He otherwise has good character. I think he's [79] otherwise a good citizen of Wisconsin. I think this was very much out of line for him, and I think this has been proven since the crime occurred. I mean, this was 5 years ago. This was June of 2005. And since then Mr. Robers has obviously not had any other crimes, has not had any other conviction or encounter with law enforcement.

I talked already about his family farm. He still is working on the farm with his father, who is here in

court today, to be a source of support for him. I think he wants to say a few words briefly.

Other than working at a ski lift and also working as a lawn mower, he's never done anything else, really, since about the age of 12 or 13. And he, again, has no plans to do so. So he's going to keep working on the farm and keep it in the family as long as he can, and continue to help his Dad.

He's 25 years old. He has no children. He's single. He does have good family support through his mother and father, who he lives with on the farm. Again, very little criminal history. The criminal history he does have is related solely to marijuana use as a teenager. There was never any incarceration imposed. I believe both of the offenses were for fines and they've been paid, his full fine amount.

He did, like I mentioned, earn his G.E.D. after missing the end of high school. He missed that because his father was injured and so he helped to take over the farm. He [80] continued to run it and so he missed out graduating with his classmates. But he did eventually get his H.S.E.D. education. He basically in his free time, other than just working on the farm, he just enjoys time with his friends and family. He does enjoy, I believe, fishing and some outdoors activities.

I think it's clear he's not a threat to the community. I think it's clear that he's not going to commit further crimes anywhere in the future. He's otherwise a productive, tax paying citizen, who basically keeps to himself and keeps to tending the farm. And again, he was involved in this offense only because he was approached, and his involvement was limited. So I would ask the Court to impose probation with any

other conditions it sees fit. And like I say, I think his Dad would like to say a few words on his behalf.

THE COURT: All right. State your name, sir, and then spell it for the purposes of the Court Reporter.

THE WITNESS: Steven J. Robers, R-O-B-E-R-S. We farm south of Burlington. The farm's been in the family since 1884. And Ben has been a part of the operation. He's a good kid. He hasn't really ever been in a whole lot of trouble, compared to a lot of kids that he's been around. Basically he's a good kid that tries to keep his nose clean. And this was just one of those unfortunate things where greed probably—by other people happened to enter into this and, you know, he got caught up in something that definitely he shouldn't have gotten caught up in. [81] And, in fact, we didn't even know about it until probably a year after it had happened. So thank you.

THE COURT: You're welcome. All right. Benjamin, you have a right to speak. Is there anything that you want to say before I pass sentence on you?

THE DEFENDANT: Just that I'd like to be able to keep running the family farm and keep basically doing what I'm doing. Staying out of trouble, which I have since this all came down on me. And like to keep running the farm, you know. That's really about all I have to say.

THE COURT: That's it?

THE DEFENDANT: Yes.

THE COURT: Well, as counsels are aware—and the Court will put on the record—the Court has to consider a variety of factors in any sentencing. The guidelines call for a sentence, as indicated, of imprisonment. The Court has to then take the sentencing guidelines,

which represent over two decades of sentencing wisdom, and then integrate that into the factors under 18 United States Code Section 3553, which are the same factors that the guidelines contain. And that is to look at the nature and circumstances of the offense, the history and characteristics of the Defendant, and then to render a sentence not more than necessary to achieve the same objectives that they both have, such as it has to reflect the seriousness of the offense, promote respect for the law, create a just punishment, [82] provide adequate deterrence, protect the public from further crimes, and take into account any needs of the Defendant, if those are relevant.

Now, relative to the first standard, the nature and circumstances of the offense, the Court touched on this not only in the other sentencings, particularly the Bradley Hollister sentence that it did, but other sentencings that it did during the restitution argument, that this is a serious offense because it involved an action that was part of a larger—much, much larger process. We talked about Countrywide here. We know that the President of Countrywide, Angelo Ansillo (phonetic), is now under investigation because of sweetheart deals he made with Senators on the Senate Banking Committee and other matters like that, that may not be directly related, but he's certainly under investigation by the S.E.C. And they're waiting for the other shoe to drop relative to criminal indictment, as the Court understands that process. And so you've got Countrywide involved, and there was not—they were not alone in this.

And the Court has mentioned easy money, and the people that—who did not have the right moral and ethical outlook took full advantage of it. The Court has seen many of these cases here in its own District where

we have people who couldn't afford houses owning 5 or 6 houses, and then bleeding those houses dry. Now you, Mr. Robers, were not a part of that. I will accept the fact, and the Government has accepted it, too, [83] that people came along, offered you some easy money. All you had to do was sign your name. But nonetheless, you became part of that larger process. But while the specific fraud is in the general analysis, as the Court has just conducted, a serious one, yours is not that serious, in relation to it. Not to diminish it, as your attorney Mr. Donovan has indicated. He's not—not meaning to diminish this.

Then I look at the history and characteristics of the Defendant. Everybody that sits before me is unique. Every individual is unique. Everybody has a profile. Everybody has to be looked at by a Judge in that way to see whether or not there are positives and negatives in that profile to determine the sentence. Coupled, of course, with the severity of the offense. And I look at you. And you've got a lot of positives here. You're apparently hard working. Your Dad has just said that. That you're basically a good kid. Mr. Donovan says you've been a prosocial person in your orientation. That you haven't been a threat to the community. Been a good citizen. Although, you know, you've been using—according to this presentence report—marijuana at an early age. And started at 16. And were using, according to what the presentence writer tells me here, and what you told her, about two bowls a day. It's a significant amount of marijuana. And people always come in here and say Judge, well, you know, all he does is use a little marijuana. I could go on and on for a long time about [84] how that little bit of marijuana use, when coupled with other little marijuana uses, in various parts of the city, the country, whatever, adds up to a big huge criminal enterprise.

They're talking about legalizing marijuana in California. Do it for medical purposes. Although that proposition was defeated in California to legalize it and expand it further. But the point is, it's still against the law. And when you use marijuana, you're part of a transaction which involves the sale of marijuana. Because I know people aren't giving it to you. And I sure hope it's not being grown on the farm. I don't think it is, but there are people who grow marijuana on farms here in Wisconsin. But—so that's not being a good citizen. But it's also, from another viewpoint, not good for you because marijuana blunts your—when you start using it in your formative years, in your teen years—I've said this many times—it blunts the neurons in your brain. It destroys the synapses in the brain so that it doesn't really function the way it should. In other words, you're a better person without marijuana. And when the brain is forming, it's even worse. Because it distorts it. This may have led to your casual attitude towards Bradley Hollister or anyone like that coming up and saying hey, Benjamin, do you want to make some easy money? It's not a big deal. But if you don't think that your smoking marijuana and violating the law in that respect is no big deal, why, you're probably going to think that something like that is no big deal, [85] either. And then, of course, you wind up in trouble, right?

THE DEFENDANT: Yes.

THE COURT: Just like you wound up at age 17 and 19. Possession of drug paraphernalia and T.H.C. back then. Those two cases. And maybe—you know, in Malaysia they don't have a drug problem. But they beat people who smoke marijuana. And they kill people who deal. And they don't have a drug problem. But we've got an Eighth Amendment here. Can't do

that. Shouldn't do that. It's cruel and unusual punishment. The point is, we rely upon free Americans to make those decisions for themselves, and respect the laws. As Lincoln said, you shouldn't violate the law, in the least particular. Because these laws that we have, Government of the people, by the people, are paid for at a high price.

Well, you are basically a very positive—you've got a very supportive Dad. You know, your family has been in—your family farm's been there for 126 years. You're part of a diminishing breed. Try to keep that alive. That's—it's something that's worth keeping. It's hard work, and it's wholesome work, and you should view it that way and live the rest of your life with that attitude and with that vision.

So I'm going to put you on probation for 3 years. And I'm going to—and this is an equitable sentence. It's a uniform sentence. Bradley Hollister would have gone to jail except, as you heard the prosecutor here, that he cooperated. [86] And that cooperation as presented to me by the Government was one which merited a probationary sentence. But this sentence is a fair one in connection with your case. So that's what I'm going to do.

I'm going to set conditions of probation. You also had the restitution amount. That's made a part of it. You cannot commit any State, Federal, or local crimes. I know this presentence report says that you've been off the marijuana, off the Mary Jane. And that's got to continue, because if you come back, that will result in the revocation of your probation. You understand that. Right, Benjamin?

THE DEFENDANT: Yes.

THE COURT: And, you know, there's a reason we call marijuana users dead heads and potheads. Because if you keep on using that stuff, that's the way you become. I mean, nothing good comes from that, right?

THE DEFENDANT: Yes, sir.

THE COURT: You have to cooperate with the supervising Probation Officer, providing that supervising Probation Officer with a D.N.A. sample. You have to obviously, as I said, refrain from the use of any controlled substances. Not only marijuana. Participate in a program of testing to include—well, not more than six urinalyses tests per month. And residential or outpatient treatment for drug or alcohol abuse. But that's only if the Probation—that's at the discretion of the supervising [87] Probation Officer.

Pay the restitution off at a rate of no less than $100 a month. File any and all income tax returns in a timely manner. Not open up any new lines of credit, or use existing credit without previous approval of the supervising Probation Officer. Provide any and all financial information to the supervising Probation Officer. And pay the $100 mandatory special assessment that the Court—that the Court indicated at the time of your plea that you were responsible for under the mandatory Victim Restitution Act. Did I mention D.N.A. sample? I did?

MS. VODAK: Yes, Your Honor.

THE COURT: Okay. The Court having rendered its disposition, is there any question as to the Court's disposition from the Government?

MS. KRAFT: No. Only I would like to say that with respect to the 911 Grant restitution, it should be joint

and several with James Lytle, Martin Valadez, Bradley Hollister, and Eric Meinel.

THE COURT: Yes.

MS. KRAFT: And the 900 Inlet Shores should be joint and several with James Lytle, Martin Valadez, John Boumenot, and Jose Valadez.

THE COURT: Yes.

MS. KRAFT: And their judgments reflect the same.

[88] THE COURT: Yes. Okay. Joint and several. Mr. Donovan, any questions?

MR. DONOVAN: No, Your Honor.

THE COURT: Mr. Robers, do you have any questions about what the Court did here today?

THE DEFENDANT: No.

THE COURT: Then I have to advise you of your appeal rights. You have 14 days to appeal this case. If you can't afford an appeal, a notice will be filed on your behalf by the Clerk of Courts. And Mr. Donovan, you will file a Notice of Appeal on Mr. Robers' behalf if he decides to do that?

MR. DONOVAN: Yes.

THE COURT: Anything else to come before the Court on this case?

MS. KRAFT: Not from the Government, Your Honor.

MR. DONOVAN: No.

THE COURT: The Court will stand in recess. Good luck to you, Mr. Robers.

* * *

[89] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

I, HEIDI J. TRAPP, Official Court Reporter for the United States District Court, Eastern District of Wisconsin, do hereby certify that I reported the foregoing Transcript of Proceedings; that the same is true and correct as reflected by my original machine shorthand notes taken at said time and place before the Hon. Rudolph T. Randa.

_____

Official Court Reporter
United States District Court

Dated at Milwaukee, Wisconsin,
this 17th day of December, 2010.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case Number: 10-CR-95

USM Number: 10551-089

UNITED STATES OF AMERICA

v.

BENJAMIN ROBERS

Christopher D. Donovan
Defendant's Attorney

Carol L. Kraft
Assistant United States Attorney

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

X pleaded guilty to count(s) One (1) of the Information

__ pleaded nolo contendere to count(s) _____ which was accepted by the court.

__ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section: 18 U.S.C. § 1343

Nature of Offense: Wire Fraud

Offense Ended: October 28, 2005

Count: 1

The defendant is sentenced as provided in Pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

__ The defendant has been found not guilty on count(s) _____

__ Count(s) _____ □ is □ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States attorney of material changes in economic circumstances.

November 22, 2010
Date of Imposition of Judgment

s/ Rudolph T. Randa
Signature of Judicial Officer

Hon. Rudolph T. Randa, U.S. District Judge
Name & Title of Judicial Officer

December 1, 2010
Date

PROBATION

The defendant is hereby sentenced to probation for a term of **Three (3) years. Probation shall commence today.**

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and two drug tests thereafter within one year.

__ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X **The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)**

X **The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)**

__ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

__ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in

accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL PROBATION TERMS

1. The defendant is to participate in a program of testing to include not more than six urinalysis tests per month and residential or outpatient treatment for drug and alcohol abuse, as approved by his probation officer, until such time as he is

released from such program. The defendant shall pay the cost of this program under the guidance and supervision of his supervising probation officer. The defendant is to refrain from excessive use of alcoholic beverages throughout the supervised release term.

2. The defendant is to pay the Restitution at a rate of not less than $100.00 per month. The defendant will also apply 100 percent of any annual federal and/or state tax refund toward payment of Restitution. The defendant shall not change exemptions claimed for either federal or state income tax purposes without prior notice to his supervising probation officer.

3. The defendant shall not open new lines of credit, which includes the leasing of any vehicle or other property, or use existing credit resources without the prior approval of the supervising probation officer. After the defendant's court ordered financial obligations have been satisfied, this condition is no longer in effect.

4. The defendant is to provide access to all financial information requested by his supervising probation officer including, but not limited to, copies of all federal and state income tax returns. All tax returns shall be filed in a timely manner. The defendant shall also submit monthly financial reports to his supervising probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Total Restitution
Totals:	$100.00	waived	$218,952.18 due joint and several (See Below)

__ The determination of restitution is deferred until _____ An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

X **The defendant must make restitution (including community restitution) to the following payees in the amount listed below.**

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of payee	Total Loss*	Restitution Ordered	Priority or Percentage
American Portfolio		$166,000.00 due joint and several with Jose Cortez Valadez, Case No. 07-Cr-158 and John Boumenot, Case No. 09-Cr-194	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

MGIC		$52,952.18 due joint and several with James Lytle, Case No. 07-Cr-113, Bradley Hollister, Case No. 08-Cr-228, and Eric Meinel, Case No. 09-Cr-217
Totals:	$_____	$ 218,952.18

__ Restitution amount ordered pursuant to plea agreement $_____

__ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

__ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

__ the interest requirement is waived for the __ fine __ restitution.

__ the interest requirement for the __ fine __ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A __ Lump sum payment of $_____ due immediately, balance due

__ not later than _____, or

__ in accordance ❑ C, ❑ D, ❑ E or ❑ F below; or

B X **Payment to begin immediately** (may be combined with ❑ C, ❑ D, or ❑ F below); or

C __ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D __ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E __ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F __ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of

criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

Defendant and Co Defendant Names, Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

Benjamin Robers; 10-Cr-95-001; $218,952.18; $166,000.00 to American Portfolio; $52,952.18 to MGIC;

Jose Cortez Valadez; 07-Cr-158-001; $166,000.00 to American Portfolio;

John Boumenot, 09-Cr-194-001; $166,000.00 to American Portfolio;

James Lytle; 07-CR-0113-001; $52,952.18 to MGIC;

Bradley Hollister, 08-Cr-228-001; $52,952.18 to MGIC;

Eric Meinel; 09-Cr-217-001; $52,952.19 to MGIC.

__ The defendant shall pay the cost of prosecution.

__ The defendant shall pay the following court cost(s):

__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 10-3794

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN ROBERS,
Defendant-Appellant.

September 14, 2012

FINAL JUDGMENT

Before: Joel M. Flaum, *Circuit Judge*
Daniel A. Manion, *Circuit Judge*
Diane S. Sykes, *Circuit Judge*

Originating Case Information:

District Court No: 2:10-cr-00095-RTR-1

Eastern District of Wisconsin

District Judge Rudolph T. Randa

We AFFIRM in part, VACATE in part, and REMAND to the district court for entry of a restitution order consistent with the opinion. The above is in accordance with the decision of this court entered on this date.

IN THE UNITED STATES OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed: 09/14/2012]

No. 10-3794

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN ROBERS,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 10 CR 95 Rudolph T. Randa, *Judge.*

Argued September 15, 2011—
Decided September 14, 2012

Before FLAUM, MANION, and SYKES, *Circuit Judges.*

MANION, *Circuit Judge.* Benjamin Robers pleaded guilty to conspiracy to commit wire fraud in violation of 18 U.S.C. § 371, based on his role as a straw buyer in a mortgage fraud scheme; Robers signed mortgage documents seeking loans which were based on false and inflated income and assets and based on his claim that he would reside in the houses as his primary residence and pay the mortgages. The loans went into default and the real estate which served as collateral for the loans were later foreclosed upon and resold.

For his role in the scheme, the district court sentenced Robers to three years' probation and ordered him to pay $218,952 in restitution to the victims—a mortgage lender of one property and the mortgage insurance company which had paid a claim on the other defaulted mortgage. Clearly, both mortgage holders experienced significant losses. Robers appeals, challenging only the restitution order.

The Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A "(MVRA"), governs federal criminal restitution. It provides, in the case of a crime "resulting in damage to or loss or destruction of property of a victim," that restitution is mandatory and that a court shall order a defendant to:

> (A) return the property to the owner of the property or someone designated by the owner; or
>
> (B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—
>
> (i) the value of the property on the date of the damage, loss, or destruction, or
>
> (ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned.[1]

18 U.S.C. § 3663A(b)(1).

The dispute in this case concerns the calculation of the "offset value." Robers argues that the MVRA requires the court to determine the offset value based on the fair market value the real estate collateral had

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[1] For simplicity's sake, we refer to the value of "the property that is returned" as the "offset value."

on the date the victim lenders obtained title to the houses following foreclosure because that is the "date the property is returned." The government counters that money was the property stolen in the mortgage fraud scheme and that foreclosure of the collateral real estate is not a return of the property stolen; rather, only when the collateral real estate is resold do the victims receive money (proceeds from the sale) which was the type of property stolen. Accordingly, the government argues that the offset value must be determined based on the eventual cash proceeds recouped following the sale of the collateral real estate.

This court in two non-precedential decisions has followed the government's approach. *See infra* at 16-18. The other circuits are split on the issue. The Second, Fifth and Ninth Circuits have held that in a mortgage fraud case, the offset value should be based on the fair market value of the real estate collateral at the time the victims obtain title to the houses. *See infra* at 18-19. Conversely, the Third, Eighth, and Tenth Circuits (and a dissent from the Ninth Circuit) have concluded that it is proper to determine the offset value based on the eventual amount recouped by the victim following sale of the collateral real estate. *See infra* at 19.

Today we join the view of the Third, Eighth, and Tenth Circuits—that the offset value is the eventual cash proceeds recouped following a foreclosure sale. We reach this decision based on the plain language of the MVRA. The MVRA states that the offset value is "the value (as of the date the property is returned) of any part of the property that is returned." 18 U.S.C. § 3663A(b)(1). "The property" for purposes of offset value must mean "the property stolen." The property originally stolen was cash. Some amount of cash is the only way part of the property can be returned. In the

mortgage fraud case we have before us, the property stolen is cash—not the real estate which serves as collateral. Accordingly, the property stolen is only returned upon the resale of the collateral real estate and it is at that point that the offset value should be determined by the part of the cash recouped at the foreclosure sale.

We also agree with the government that the victims are entitled to expenses (other than attorney's fees and unspecified fees) related to the foreclosure and sale of the collateral property because those expenses were caused by Robers's fraud and reduced the amount of the property (cash) returned to the victim lenders. Because the district court included attorney's fees and unspecified fees in the restitution award, we vacate that portion of the district court's award, but otherwise affirm, and remand for proceedings consistent with this opinion.

I. Background

Benjamin Robers was a straw buyer in a mortgage fraud scheme devised by James Lytle and carried out by Lytle and others. The scheme involved the submission of fraudulent loan applications which materially misrepresented the straw buyers' income, qualifications, and intent to live in the houses and repay the mortgages. The misrepresentations caused loan funds to be wired by lenders to settlement companies which closed the loans. The loans went into default and the banks later foreclosed on and then sold the houses which served as collateral for the loans.

The scheme involved more than fifteen houses in a small geographical area in Walworth County, Wisconsin. Robers served as a straw purchaser for only two houses—one on Grant Street in Lake Geneva and

the other on Inlet Shores in Delavan. In the loan applications, which he signed, Robers falsely stated that he would use the houses as his primary residence and that he would pay the notes secured by the mortgages on the houses; he also provided false and inflated information concerning his income and assets. For his role in the scheme, Robers received a mere pittance—about $500 for each loan. Both loans went unpaid and the houses eventually went into foreclosure. After the government learned of the fraud, Robers waived indictment and pleaded guilty to an information charging him with one count of conspiracy to commit wire fraud.

After Robers pleaded guilty, the United States Probation Office prepared a Presentence Investigation Report ("PSR"). Of relevance to this appeal, the PSR recommended that Robers should be required to pay $218,952.18 in restitution, pursuant to the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A "(MVRA"). Robers objected to the $218,952.18 figure, arguing that his minor role in the offense and his limited economic circumstances should result in a total restitution obligation of $4,800. Robers also claimed that the proposed restitution award improperly held him responsible for the decline in real estate values and consequential and incidental expenses.

At sentencing, the government argued that neither Robers's limited role in the offense nor his limited resources justified a lower restitution amount, jointly and severally owed by all of the participants in the scheme. The government then presented testimony from two witnesses to establish the amount of restitution. First, Jim Farmer, a representative of Mortgage Guaranty Insurance Corporation ("MGIC"), testified that MGIC had insured the Grant Street

mortgage (which was owned by Fannie Mae) and that Fannie Mae had submitted a claim for $159,214.91, which included unpaid principal, accrued interest, attorney's fees, property taxes, and other related expenses. Farmer explained that MGIC had the option of paying a percentage of the claim or paying the full amount of the loss and acquiring the real estate and then liquidating it. MGIC chose to do the latter and was able to reduce the amount of its loss to $52,952.18, which was lower than the amount it would have had to pay had it paid a percentage of Fannie Mae's claim. In mitigating its loss, though, MGIC incurred additional expenses, such as hazard insurance, yard maintenance, and the realtor's commission.

FBI Special Agent Michael Sheen also testified at the sentencing hearing. After detailing how the scheme operated, he explained that the Inlet Shores house had a mortgage note of $330,000 owned by American Portfolio and that the foreclosed real estate eventually sold for $164,000, resulting in a $166,000 loss. There were additional expenses related to the foreclosure sale, but American Portfolio had not responded to the government's request for additional information. Accordingly, the amount of restitution requested for the Inlet Shores mortgage was limited to $166,000.

The district court sentenced Robers to three years' probation—a below-Guideline sentence. Based on the testimony at the sentencing hearing, the district court ordered restitution of $166,000 to American Portfolio and $52,952.18 to MGIC, for a total restitution award of $218,952.18. Robers's co-conspirators who were involved with the procurement of the Grant Street and Inlet Shores mortgages were also ordered to pay restitution in the same amounts and the restitution

awards were all entered with joint and several liability.[2] Robers appeals, challenging only the restitution award.

II. Analysis

On appeal, Robers argues that the district court erred in calculating the amount of restitution based on the eventual resale value of the foreclosed real estate. Robers maintains that the district court should have based the restitution award instead on the fair market value of the real estate at the date of foreclosure, and that by using the eventual resale proceeds of the houses he was wrongly held responsible for the decline in their value. Robers also argues that many of the miscellaneous expenses included in the loss calculation for the Grant Street house are consequential or incidental damages that are not properly considered in a restitution award.[3] While generally we review a restitution order deferentially, reversing only for an abuse of discretion, both of Robers's arguments present questions of the award's legality. As such, our review is *de novo*. *United States v. Webber*, 536 F.3d 584, 601 (7th Cir. 2008) ("We review de novo questions of law regarding the federal courts' authority to order restitution; we review for abuse of discretion a district court's calculation of restitution, taking the evidence in the light most favorable to the Government.")

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[2] Restitution in the amount of $166,000 was ordered to American Portfolio, due jointly and severally with Jose Cortez Valadez, Case No. 07-CR-158 and John Boumenot, Case No. 09-CR-194. And restitution of $52,952.18 was ordered to MGIC jointly and severally with James Lytle, Case No. 07-CR-113, Bradley Hollister, Case No. 08-CR-229, and Eric Meinel, Case No. 09-CR-217.

[3] Robers does not argue on appeal that his minor role in the offense and his limited economic circumstances should reduce the restitution amount.

(internal citations omitted). *See also United States v. Yeung*, 672 F.3d 594, 600 (9th Cir. 2012) ("We review the legality of a restitution order, including the district court's valuation method, de novo.").

A. Offset Value

1. The statutory language

The MVRA governs federal criminal restitution and provides, in relevant part, that a sentencing court "shall order" defendants convicted of certain crimes to "make restitution" to their victims.[4] 18 U.S.C. § 3663A(a)(1). In the case of a crime "resulting in damage to or loss or destruction of property of a victim," the statute further provides that the order of restitution shall require the defendant to:

> (A) return the property to the owner of the property or someone designated by the owner; or
>
> (B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—
>
> > (i) the value of the property on the date of the damage, loss, or destruction, or
> >
> > (ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned.

18 U.S.C. § 3663A(b)(1).

Robers argues that the plain language of the MVRA required the district court to reduce the restitution

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[4] Robers agreed that the ultimate victim of the Inlet Shores fraud was American Portfiolio and that MGIC was the ultimate victim of the Grant Street fraud.

award by the value of the mortgaged real estate as of the date of foreclosure because that is the value "as of the date the property is returned." He contends that it was legal error for the court to calculate the offsetting amount based on the eventual resale prices of the real estate because the houses were resold many months after the foreclosure actions gave title to the victim lenders.[5] And with the burst of the real estate bubble in the mid-2000s, Robers maintains that the houses sold for less, not based on his fraud, but for other unrelated reasons. The government responds that Robers's argument misreads the MVRA and argues that under the plain language of the MVRA, the restitution award is only reduced at the time that the mortgaged collateral is sold because cash is the property that was taken and cash is only returned at that point in time.

We agree with the government. More specifically, we hold that in calculating a restitution award where, as in this case, cash is the property taken, the restitution amount is reduced by the eventual cash proceeds recouped once any collateral securing the debt is sold.

We reach this holding based on the plain language of the MVRA. The MVRA states that the restitution award is reduced by "the value (as of the date *the property* is returned) of any part of *the property* that is returned." 18 U.S.C. § 3663A(b)(1)(B)(ii) (emphasis added). Read in the context of the statute, "the property" must mean the property originally taken from the victim. The applicable subsection of the MVRA first addresses the situation we have here—where

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[5] The Inlet Shores house was sold 31 months after foreclosure but it is unclear from the record when the Grant Street real estate was sold.

there is "damage to or loss or destruction of property of a victim of the offense." In this case the "loss" the victims suffered was a significant amount of cash. Next, it refers to the return of "the property to the owner." 18 U.S.C. § 3663A(b)(1). In this case, since the property taken from the victims was cash, the two houses purchased with the cash were not the property taken from the lenders, but rather were collateral that secured the cash loans. The two cannot be equated. Cash is liquid. Real estate is not. The victim-lender was defrauded out of cash and wants cash back; the victim does not want the houses and they do not, in any way, benefit from possessing title to the houses until they are converted into cash upon resale. Under the plain language of the statute, what matters is when at least part of the cash was returned to the victims—not when the victims received title to the houses securing the loans. And the cash was returned to the victims only when the collateral houses securing the loans were eventually resold.

Our interpretation of the MVRA gives the phrase "the property" a consistent meaning throughout the statute: It always means "the property stolen." Robers's interpretation, on the other hand, seeks to give the phrase "the property" a different meaning within the same statutory section. Under Robers's interpretation the property returned would be the collateral houses and their estimated value at the time the victim receives title. However, "[t]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Matter of Merchants Grain, Inc. By and Through Mahern*, 93 F.3d 1347, 1356 (7th Cir. 1996) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). The MVRA directs the court to offset the loss by "the value (as of the date

the property is returned) of any part of the property that is returned." Under Robers's interpretation "any part" of the property returned would have to refer to the collateral house. Obviously part of a house cannot be returned. Nor can a house (or any part of a house) be the same as cash. It is only when "the property" means "the property stolen" (cash) that the "*any part*" language makes sense, because then it is possible to return only a part of the property. A house is not part of the cash. Thus, our reading both gives the phrase "the property" a consistent meaning throughout the MVRA and does not render the "*any part*" language of the statute superfluous or nonsensical.

2. The MVRA's statutory goal

The MVRA's overriding purpose is "to compensate victims for their losses." *United States v. Pescatore*, 637 F.3d 128, 138 (2d Cir. 2011) (internal quotations omitted). And

> [b]ecause the MVRA mandates that restitution be ordered to crime victims for the "full amount" of losses caused by a defendant's criminal conduct, *see* 18 U.S.C. § 3664(f)(1)(A); *United States v. Reifler*, 446 F.3d at 134 . . . , it can fairly be said that the "primary and overarching" purpose of the MVRA "is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being."

United States v. Boccagna, 450 F.3d 107, 115 (2d Cir. 2006) (quoting *United States v. Simmonds*, 235 F.3d 826, 831 (3d Cir. 2000).

Our holding is consistent with the goals of the MVRA, as well as the concept of restitution. The offset amount for purposes of restitution is the cash recouped

following the disposition of the collateral. Otherwise the victims would not be made whole again because the eventual sales proceeds could be, as they were in this case, woefully inadequate to fully compensate the victims for their loss and to put them in the position they would have been absent the fraud.

Robers claims otherwise, asserting that our reading of the MVRA makes him the insurer of real estate values and improperly holds him responsible for declines in the real estate market. Robers then posits that the victims' losses in this case were caused by the collapse of the real estate market and not his fraud. Therefore holding him responsible for the further decline in the real estate values—after the victims acquired title to the houses—violates the underlying purpose of the MVRA.

Not so. Contrary to Robers's argument, his fraud actually caused the losses at issue here. Absent his fraudulent loan applications, the victim lenders would not have loaned the money in the first place. Likewise the mortgage notes would not have been extended, not paid, and then defaulted upon. And the banks would not have had to foreclose on and then resell the real estate in a declining market at a greatly reduced value.

The decline in the real estate market does not mitigate his fraud. Robers lied about several things—his intent to reside in the house as his primary residence, his promise to pay the mortgage, his inflated income, and his exaggerated asset value. Absent Robers's fraud, the decline in the real estate market would have been irrelevant: Assuming he actually qualified for the loans, he would be living in the house and making the mortgage payments out of the income he claimed to be earning. If his assets had

the value he claimed, he would not want to risk using them to satisfy any deficiency following a foreclosure sale. The declining market only became an issue because of Robers's fraud. *See Yeung*, 672 F.3d at 603 n.5 ("[H]ere Yeung created the circumstances under which the harm or loss occurred through her use of false information that induced the Long Beach Trust to purchase the loan. Because the Long Beach Trust's loss is directly related to Yeung's offense, the declining value of the real estate collateral, even if attributable to general financial conditions, does not disrupt the causal chain, and the victims of the fraud are entitled to restitution.") (internal citation omitted).[6] Essentially Robers wants a bailout, leaving the victims of his fraud to suffer the consequences of his deceit. Robers, not his victims, should bear the risk of market forces beyond his control. *See United States v. Rhodes*, 330 F.3d 949, 954 (7th Cir. 2003) ("[The defendant], rather than the victims, should bear the risk of forces beyond his control." (quoting district court opinion)).

If the real estate values increased, thereby allowing the creditor to resell the houses at a higher amount than owed, the bank would not be entitled to a restitution award. Similarly, if the increased sales price merely reduced the bank's loss, it would obviously be error for the district court to order restitution based on the earlier lower market value because "[t]he VWPA and MVRA ensure that victims recover the full amount of their losses, but nothing more." *United States v. Newman*, 144 F.3d 531, 542 (7th Cir. 1998). *See also United States v. Smith*, 156 F.3d 1046, 1057 (10th Cir. 1998) ("[A] district court may not order

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[6] Contrary to our holding, *Yeung* held that the offset value for purposes of restitution is the collateral's value at the time title transfers to the loan holder. *See infra* at 25-28.

restitution in an amount that exceeds the loss caused by the defendant's conduct. Such a restitution order would amount to an illegal sentence. [T]he imposition of an illegal sentence constitutes plain error.") (internal quotations omitted). Thus, what Robers truly seeks is a one-way ratchet. But "the 'intended beneficiaries' of the MVRA's procedural mechanisms 'are the victims, not the victimizers.'" *United States v. Moreland*, 622 F.3d 1147, 1172 (9th Cir. 2010) (quoting *United States v. Grimes*, 173 F.3d 634, 639 (7th Cir. 1999)).[7]

3. Seventh Circuit precedent

Our holding is consistent with this circuit's previous decisions reached in non-precedential orders. In *United States v. Cage*, 365 Fed. App'x 684, 687 (7th Cir. 2010), this court stated:

> The restitution amount proposed by the government and adopted by the court at sentencing was the amount in mortgage loans that Cage helped to fraudulently secure less the amount the lenders recovered through the sale of the fraudulently purchased properties. This was a proper way to calculate the amount of restitution [] owed . . . .

And in *United States v. Bates*, 134 Fed. App'x 955 (7th Cir. 2005), we explained the difference between the

---

[7] If a district court had entered a restitution order based on the estimated fair market value of the real estate prior to resale and the eventual sales proceeds ended up higher, a defendant could come back to court and request that the restitution award be reduced. Rather than speculate and then later adjust the restitution award, we believe the better approach is to do what, according to the government, the Eastern District of Wisconsin does: If the collateral real estate has not been sold by the time of sentencing, the court enters a restitution award for the total loss to the victims and once the real estate is sold, the court modifies the restitution award based on the cash proceeds.

property stolen (cash) and the property returned (real estate collateral) stating:

> Bates insists that Coldwell did not suffer any compensable loss because it ended up with the residence, and that the "loss" claimed by the realtor in fact consists of unrecoverable "incidental and consequential damages" and "lost profits." Bates, though, did not take a house from Coldwell; she caused the realtor to lose cash, but cash is not what was "returned" to Coldwell. Coldwell assumed temporary ownership of the residence only as a means of mitigating Bates's fraud, and so long as Coldwell possessed a residence it did not want instead of the funds Bates caused it to expend, the realtor was not made whole—Bates's fraud placed Coldwell in the position of real estate seller rather than realtor.

Id. at 958.

These Seventh Circuit decisions, though, as noted, are non-precedential.[8] The other circuits are split on

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[8] In *United States v. Shepard*, 269 F.3d 884, 888 (7th Cir. 2001), this court also considered the question of the appropriate amount of offset, but *Shepard* is distinguishable from the case at hand. In *Shepard*, the defendant argued that "he and his wife 'returned' about $12,000 of the [stolen] $92,000 by using it to make improvements in [the victim's] home." *Id.* at 887. We noted that "to the extent improvements increased the market value of [the victim's] house, and thus were (or could have been) realized by [the victim's] estate in selling the property, the funds were 'returned' for statutory purposes." *Id.* We continued: "It is no different in principle from taking the money from one of [the victim's] bank accounts and depositing it in another a week later. So long as [the victim] regained beneficial use of the property, it has been 'returned' as § 3663A(b)(1)(B)(ii) uses that term." *Id.* at 887-88. In *Shepard*, though, the government did not contend that the "the change of the property's form—from cash to, say, central

the appropriate offset amount to use in calculating restitution.[9] In a series of cases, the Ninth Circuit has held that the offset amount is the fair market value of the collateral real estate at the date of foreclosure when the victim-lender took title and could have sold it for cash. *See United States v. Smith*, 944 F.2d 618, 625-26 (9th Cir. 1991); *United States v. Hutchison*, 22 F.3d 846, 856 (9th Cir. 1993); *United States v. Catherine*, 55 F.3d 1462, 1465 (9th Cir. 1995); *United States v. Davoudi*, 172 F.3d 1130, 1135 (9th Cir. 1999); *United States v. Gossi*, 608 F.3d 574, 578 (9th Cir. 2010); *United States v. Yeung*, 672 F.3d 594, 605 (9th Cir. 2012). The Second and Fifth Circuits have similarly held that in a mortgage fraud case, the restitution offset is based on the fair market value of the collateral at the time it is returned to the victim. *See United States v. Boccagna*, 450 F.3d 107, 120 (2d Cir. 2006); *United*

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air conditioning—precludes a conclusion that the property has been 'returned.'" *Id.* at 888. Moreover, in *Shepard*, the victim was using and benefitting from the home improvements, whereas in this case, the victims were not using the collateral, but were merely attempting to sell the collateral to recoup their stolen property—cash. Finally, while *Shepard* remanded the case for determination of "the amount by which improvements enhanced the market value of the house," there was no discussion concerning the appropriate time for this valuation, i.e., upon resale of the house or at the time the home improvements were made. *Id.* Thus, *Shepard* does not answer the question before us.

[9] The following cases interpret both the MVRA and its predecessor, the Victim and Witness Protection Act of 1982 ("VWPA"). Unlike the MVRA, the VWPA required courts to consider the economic circumstances of the defendant prior to ordering restitution, and the granting of restitution was discretionary, not mandatory. *See* 18 U.S.C. § 3663. "With these exceptions, the two statutes are identical in all important respects, and courts interpreting the MVRA may look to and rely on cases interpreting the VWPA as precedent." *See United States v. Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004).

States v. Holley, 23 F.3d 902, 915 (5th Cir. 1994). Conversely, the Third, Eighth, and Tenth Circuits have held that it is proper to base the offset value on the eventual amount recouped by the victim following sale of the collateral real estate. *See United States v. Himler*, 355 F.3d 735, 745 (3d Cir. 2004); *United States v. Statman*, 604 F.3d 529, 538 (8th Cir. 2010); *United States v. James*, 564 F.3d 1237, 1246-47 (10th Cir. 2009).

4. Circuits holding that the offset value is determined based on the estimated fair market value of the collateral securing the loans at the date of foreclosure when title is transferred to the lender

Our conclusion conflicts with the view of the Ninth, Fifth, and Second Circuits. As noted above, those courts all held that the offset amount is the estimated fair market value of the collateral at the date of foreclosure. In reaching this conclusion, the courts all purported to rely on the plain language of the MVRA, stressing that under the MVRA, courts are to reduce the restitution award by "the value (as of the date *the property* is returned)." But none of those cases actually addressed the question of what constitutes "the property" under the statute. And their conclusions are based on the courts improperly treating the collateral recovered as the property stolen.

a. The Ninth Circuit

Examining the development of the case law in the Ninth Circuit illuminates this omission. *Smith* was the first of the cases to consider the appropriate offset in a similar situation—where the victim lent cash based on the defendant's fraud and eventually foreclosed on the real estate securing the loan. *Smith*, 944 F.2d at 620-21. In *Smith*, the defendant asserted

"that the district court failed to give him adequate credit against the restitution amount for the value of the collateral property," arguing that the court should have used the value of the real estate at the time the victims regained title to the property. *Id.* at 625. Smith alleged "that because the value of Texas real estate steadily declined throughout the time in question, the measurement of the property's value at the later dates resulted in an inadequate credit for the collateral property, and that therefore the restitution figure is far too high." *Id.* The Ninth Circuit agreed with defendant Smith. And *Smith* serves as the linchpin for further cases. Because the court went astray in *Smith* by applying language in the much different property restitution case *(Tyler)*, we quote its reasoning in full:

> We agree with Smith that the district court used incorrect dates in valuing the property. The Act provides that if a victim has suffered a loss of property, the district court may order restitution in the amount of this loss "less the value (*as of the date the property is returned*) of any part of the property that is returned." 18 U.S.C. § 3663A(b)(1) (emphasis added). We interpreted this portion of the Act in *United States v. Tyler*, 767 F.2d 1350 (9th Cir. 1985) *(Tyler)*, in which Tyler pled guilty to theft of timber and was ordered to pay restitution under the Act. The district court determined the amount of restitution as the difference between the value of the timber at the time of sentencing and the higher value at the time of theft. *Id.* at 1351. Because the government recovered the timber on the day of the theft, however, we concluded that "[a]ny reduction in its value stems from the government's decision to hold the timber during a period of declining prices, not from Tyler's criminal acts." *Id.* at 1352. The value of the

> property "'as of the date the property [was] returned'" equaled the amount lost when the timber was stolen, and therefore restitution under the Act was inappropriate. *Id.* (quoting 18 U.S.C. § 3579, which was subsequently renumbered as 18 U.S.C. § 3663).
>
> The same reasoning should apply in determining the value of the collateral property in this case. Smith should receive credit against the restitution amount for the value of the collateral property as of the date title to the property was transferred to either Savings & Loan or Gibraltar. As of that date, the new owner had the power to dispose of the property and receive compensation. *Cf.* 18 U.S.C. § 3663(e)(1) (restitution may be ordered for any person who has compensated a victim). Value should therefore be measured by what the financial institution would have received in a sale as of that date. Any reduction in value after Smith lost title to the property stems from a decision by the new owners to hold on to the property; to make Smith pay restitution for that business loss is improper. *See Tyler,* 767 F.2d at 1352. The victims in this case "receive[d] compensation" when they received title to the property and the corresponding ability to sell it for cash; the value of the compensation should therefore be measured and deducted from the total loss figure as of the date title was transferred. 18 U.S.C. § 3663(e)(1). Because the law is clear, to do otherwise would be an abuse of discretion.

Id. at 625-26

There are several flaws in *Smith's* reasoning. First, *Smith* quoted, with emphasis, the "less the value (as of the date the property is returned)" language from

the MVRA, but ignored the fact that the property returned was not the property stolen. *See Smith*, 944 F.2d at 631-32 (O'Scannlain, J., dissenting) (explaining that the majority "erroneously treats the five collateral properties as if they are somehow equivalent to the stolen capital," but "[w]hat Smith stole was capital, and to restore his victims to the status quo ante, he must return the present value of that capital."). Second, and relatedly, the Ninth Circuit in *Smith* relied heavily on its decision in *Tyler* to support its reasoning, but *Smith's* reliance on *Tyler* was misplaced because in *Tyler,* the defendant was charged with theft of government timber and the exact same property (i.e., the timber) was recovered on the very day of the theft. Thus, *Tyler* does not support the view that "the property" in the MVRA means any property returned, as opposed to the property stolen. *See Smith*, 944 F.2d at 632 (O'Scannlain, J., dissenting) ("Nor does our decision in *United States v. Tyler*, 767 F.2d 1350 (9th Cir. 1985), upon which both the majority and Smith rely, support the court's holding. *See ante* at 624-25. A defrauded lender's assumption of title over collateral property that is itself part of the fraud is in no way analogous to a timber owner's recovery of stolen timber.") Third, *Smith* reasoned that as of the date the victim received title to the collateral, the new owner had the power to dispose of the real estate and receive compensation, and accordingly the value of the real estate should be based on the amount the financial institution would have received in a sale as of that date. This reasoning ignores the reality that real property is not liquid and, absent a huge price discount, cannot be sold immediately. Fourth and finally, the court in *Smith* unreasonably assumed that any reduction "after Smith lost title to the property stems from a decision

by the new owners to hold on to the property." *Smith*, 944 F.2d at 625. This rationale also incorrectly assumes that real estate is liquid—which it is not.

We say all of this because the Ninth Circuit's decision in *Smith* served as the keystone for all of the subsequent decisions holding that the offset value is the fair market value of the collateral real estate on the date the title to the collateral reverted to the victim. For instance, in *United States v. Hutchinson*, 22 F.3d 846 (9th Cir. 1993), the defendant challenged the district court's use of the final sales price as the offset value. Based on *Smith*, the Ninth Circuit agreed that the appropriate offset was the value of the collateral at the time the bank gained control of the real estate. Similarly, in *United States v. Catherine*, 55 F.3d 1462 (9th Cir. 1995), the defendant argued that the district court should have valued the real estate for offset purposes at the time the victim foreclosed on the collateral real estate, and the Ninth Circuit stated: "We decided this exact issue in *Hutchinson*, *id.* at 854-56, which in turn, relied on *United States v. Smith*." *Id.* at 1465. The court in *Catherine* then followed these precedents and reversed and remanded the case for the district court to value the collateral at the time the bank received title. *Id.* And in *United States v. Davoudi*, 172 F.3d 1130 (9th Cir. 1999), the Ninth Circuit again held that the district court erred in basing its offset valuation on the eventual sales price of the collateral. *Davoudi* parroted *Smith's* reasoning and cited *Smith*, *Catherine*, and *Hutchinson*. Then in *United States v. Gossi*, 608 F.3d 574 (9th Cir. 2010), the Ninth Circuit relied on *Davoudi*, to conclude: "Under this Court's precedent, the district court reasonably found that [the victim] had the power to dispose of the property at the time it took control of the property at foreclosure. 'Value should therefore be measured by what the

financial institution would have received in a sale as of that date.'" *Id.* at 578 (quoting *Smith*, 944 F.2d at 625).

The final and most recent decision from the Ninth Circuit is *United States v. Yeung*, 672 F.3d 594 (9th Cir. 2012). In *Yeung*, the court considered the propriety of several restitution orders to financial institutions which suffered losses following a fraudulent real estate scheme and stated:

> Using the framework set forth in § 3663A(b), we have developed some guidelines for calculating the restitution amount in a case involving a defendant's fraudulent scheme to obtain secured real estate loans from lenders. Generally, district courts calculating a direct lender's loss in this context begin by determining the amount of the unpaid principal balance due on the fraudulent loan, less the value of the real property collateral as of the date the direct lender took control of the property. *United States v. Hutchison*, 22 F.3d 846, 856 (9th Cir. 1993); *United States v. Smith*, 944 F.2d 618, 625-26 (9th Cir. 1991) (construing the VWPA). Because restitution should address a victim's "actual losses," *see Smith*, 944 F.2d at 626, we have approved restitution awards that included other amounts in the calculation of loss, such as prejudgment interest (using the governmental loan rate), *id.*, interest still due on the loan, *Davoudi*, 172 F.3d at 1136, and expenses associated with holding the real estate collateral that were incurred by the lender before it took title to the property, *Hutchison*, 22 F.3d at 856. To calculate the value of the real property collateral "as of the date the property is returned," § 3663A(b)(1)(B)(ii), courts use the value of the

> collateral "as of the date the victim took control of the property," *Davoudi*, 172 F.3d at 1134. The lender does not take control of the collateral merely by triggering the foreclosure process. *See United States v. Gossi*, 608 F.3d 574, 578 (9th Cir. 2010). Rather, the lender generally takes control on the date the lender either (1) receives the net proceeds from the sale of the collateral to a third party at the foreclosure sale, *see United States v. James*, 564 F.3d 1237, 1246 (10th Cir. 2009), or (2) takes title to the real estate collateral at the foreclosure sale, at which time "the new owner had the power to dispose of the property and receive compensation," *see Smith*, 944 F.2d at 625. The direct lender's losses may also be reduced by amounts recouped from resale of the loan or from other types of "return" of property. *See, e.g., Hutchison*, 22 F.3d at 856.

Id. at 601.

On the basis of this precedent, the Ninth Circuit in *Yeung* then reversed the district court's restitution awards, which were based on the subsequent sales price of the real estate, and remanded to the district court.[10]

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[10] *Yeung* also held that "when a victim purchased a loan in the secondary market, that is, where the victim is the loan purchaser as opposed to the loan originator . . . the value of that loan is not necessarily its unpaid principal balance, but may vary with the value of the collateral, the credit rating of the borrower, market conditions, or other factors, [and thus] the loan purchaser may have purchased the loan for less than its unpaid principal balance." *Yeung*, 672 F.3d at 601-02. The Ninth Circuit in *Yeung* then remanded the case to the district court to recalculate the restitution award. Robers filed *Yeung* as supplemental authority and argued that, as in *Yeung*, remand is required to determine the price at which the loans were purchased in the secondary

As the above excerpt from *Yeung* makes clear, its holding was based on the well-established precedent that flowed from *Smith*. And as discussed above, none of those cases addressed the fundamental distinction between the property stolen (cash) and the property recovered (real estate). Like its predecessors, *Yeung* did not recognize that the *Smith* decision relied on *Tyler*, which was factually distinguishable from all of the cases at hand because *Tyler* involved a case where the property the defendant was charged with stealing was the same as the property returned to the victim (timber) and the theft and return happened on the same day.

b. The Fifth Circuit

The *Smith* decision has likewise served as the basis for other circuits holding that the offset value is the value of the collateral at the time of foreclosure. In *United States v. Holley*, 23 F.3d 902, 915 (5th Cir. 1994), the Fifth Circuit, like the Ninth Circuit, held that the offset value should be based on the fair market value on the date of foreclosure. In coming to this conclusion, the Fifth Circuit first stated that its decision in *United States v. Reese*, 998 F.2d 1275 (5th Cir. 1993), dictated the result. It noted that in *Reese* it had

> explained that "it would appear that the 'property' as to which [the savings and loan] might have suffered 'damage to or loss or destruction of' could only be loan proceeds funded in cash at the

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market. Robers, however, had never previously argued (either before the district court or in briefing or at oral argument) that the restitution award was improperly based on the outstanding principal balance, as opposed to some potentially lower amount paid for the loans in the secondary market. Therefore, he has waived these issues.

> original closing of [the improperly extended] loan." *Id.* at 1283. However, we also explained that when the real property that secures such a loan is deeded back to the financial institution, "the value of such property should constitute a partial return of the 'cash loan proceeds.'" *Id.* at 1284.

Holley, 23 F.3d at 915.

But the court's reasoning in *Reese* was limited to this statement: "Conceptually, it would seem to us that when a lender accepts conveyance of the secured property in lieu of foreclosure, the value of such property should constitute a partial return of the 'cash loan proceeds.'" *Reese*, 998 F.2d at 1284. This reasoning ignores the fact that the victim accepted the collateral real estate, not in lieu of the cash proceeds, but in order to sell and recoup the cash proceeds.

After citing the reasoning of *Reese*, the court in *Holley* then turned to *Smith*, stating:

> The *Smith* court held that the defendant "should receive credit against the restitution amount for the value of the collateral property as of the date title to the property was transferred" to the FSLIC's successor. *Id.* at 625. The court reasoned that, as of that date, "the new owner had the power to dispose of the property and receive compensation." *Id.* The *Smith* court concluded that the value of the returned property "should therefore be measured by what the financial institution would have received in a sale as of that date. Any reduction in value after [the defendant] lost title to the property stems from a decision by the new owners to hold on to the property." *Id.*

Holley, 23 F.3d at 915.

Unlike the Ninth Circuit's decision in *Smith*, the Fifth Circuit in *Holley* at least acknowledged the government's argument "that the 'property' that was lost was [the bank's] capital and that the return of [the real estate] to [the bank] represents only the return of the collateral for the actual property involved in this case" and that it was not until that collateral was sold for cash that the victim regained its property. *Id.* But *Holley* did not provide any basis for ignoring this distinction, other than citing its previous decision in *Reese*. *See id.* And *Reese* merely concluded that there was no "conceptual" difference. *Reese*, 998 F.2d at 1284. However, as explained above, the two are not conceptually equivalent: cash is liquid, real estate is not; the collateral secured the cash loan—it was not the cash loan; and the victim had cash before the fraud and wanted cash back as its returned property. In short, we find the Fifth Circuit's reasoning in *Reese* unpersuasive and thus its decision in *Holley* adds nothing to the analysis.

c. The Second Circuit

Finally, the Second Circuit addressed the issue of offset value in *United States v. Boccagna*, 450 F.3d 107 (2d Cir. 2006). In *Boccagna*, the defendants were charged in a mortgage fraud scheme involving the United States Department of Housing and Urban Development ("HUD"). *Id.* at 109-110. HUD foreclosed on the collateral and then resold the real estate at a fraction of their fair market value to the New York City Department of Housing Preservation and Development in order to further its mission to develop lowcost housing. *Id.* at 110. When considering the appropriate amount by which to offset the victim's loss, the *Boccagna* court initially noted that the government did not argue that "the property that is

returned" language of the MVRA only applies to actual cash and not to "any property that HUD obtained after default." *Id.* at 112 n.2. The court then said that "[s]uch an argument would not be convincing," but based its holding on precedent from the Fifth and Ninth Circuits.[11] *Id. Boccagna* explained:

> As two of our sister circuits, construing identical offset language in the Victim and Witness Protection Act, codified at 18 U.S.C. § 3663, have concluded, when a lender victim acquires title to property securing a loan, "the value of such property should constitute a partial return of the cash loan proceeds." *United States v. Holley*, 23 F.3d 902, 915 (5th Cir. 1994) (internal quotation marks omitted); *see United States v. Smith*, 944 F.2d 618, 625 (9th Cir. 1991) (holding that defendant "should receive credit against the restitution amount for the value of the collateral property as of the date title to the property was transferred" to lender victim).

Boccagna, 450 F.3d at 112 n.2.

The Second Circuit in *Boccagna* then went on to hold that the offset value should generally be based on the fair market value of the real estate at the time of foreclosure. *Id.* at 109. *Boccagna*, thus, adds nothing to the analysis, having merely relied on *Holley* and *Smith*—which were incorrect for the reasons noted above.

In sum, as our detailed discussion of the Ninth, Fifth and Second Circuits' decisions explains, those decisions all relied on the keystone decision in *Smith*. And the

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[11] The court in *Boccagna* also cited this court's decision in *Shepard*. But as discussed above, *see supra* at 17-18 n.8, *Shepard* is distinguishable.

Ninth Circuit's reasoning in *Smith* is flawed for several reasons: *Smith* purported to rely upon the statutory language but ignored the distinction between the property stolen (cash) and the property returned (real estate). Compounding this error was *Smith's* reliance on *Tyler* which was factually distinct. In *Tyler*, the defendant was charged with stealing timber and the property recovered—on the same day as the theft—was timber. Thus, *Tyler* does not answer the question of the appropriate offset value where the property stolen and returned differ. The Ninth Circuit in *Smith* also treated real estate as a liquid asset. But it was not liquid because the collateral could not be turned into cash the same day title transferred. The court misconstrued the market forces by assuming that the only reason collateral would not be immediately turned into cash would be a deliberate decision by the victim to hold on to the property. Beyond *Smith's* faulty reasoning, the only additional rationale for using the value of real estate at the time the victim obtained title to the collateral was the Fifth Circuit's view in *Reese* that, conceptually, obtaining title to real estate is the same as receiving cash. But it is not: real estate is not liquid; it is not what was stolen; it is not what the victim wants; and it does not benefit the victim in any way until it is turned back into cash upon resale. Accordingly, it is only when the real estate is converted into cash through a future sale that the offset value should be determined. The plain language of the MVRA dictates this conclusion because "the value (as of the date *the property* is returned)," 18 U.S.C. § 3663(b) (emphasis added), in the context of the statute must mean the property taken from the victim. But even if there were any ambiguity in the meaning of "the property," we would interpret that language to best achieve the statutory goal of the

MVRA—to make the victim whole—and this goal is best achieved by calculating restitution based on the actual cash proceeds recouped following the resale of any collateral real estate.

5. Circuits holding that the offset value is determined based on the cash proceeds recouped following resale of the collateral real estate.

This brings us now to the decisions from the Third, Eighth and Tenth Circuits, which have all held that their respective district courts correctly used, as the offset value for calculating restitution, the eventual proceeds recouped following a foreclosure sale.[12]

a. The Third Circuit

The Third Circuit addressed this issue in *United States v. Himler*, 355 F.3d 735 (3d Cir. 2004). In *Himler*, the defendant had fraudulently purchased a condominium by tendering false checks to a settlement company that in turn paid the seller $193,833. *Id.* at 737. The district court ordered Himler "to pay restitution in the amount of $193,833—to be reduced by the ultimate net proceeds from the sale of the condominium." *Id.* at 744. The Third Circuit upheld that award, noting first that the victim in this case "was not a seller of the condominium who was returned to his or her pre-crime position upon reobtaining title to the condominium. Rather, [the victim] was the settlement company that facilitated the purchase and sale between [the seller] and [the defendant]." *Id.* And deeding the collateral real estate back to the settlement company

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[12] As discussed earlier, *see supra* at 23, Judge O'Scannlain dissented in the pivotal Ninth Circuit opinion (*United States v. Smith*), preferring the same approach to the offset valuation later approved by the Third, Eighth, and Tenth Circuits.

did not adequately compensate the victim for its loss.[13] *Id.* at 744-45. The Third Circuit then noted that the government had conceded that the statute requires a district court to "value" the property "as of the date the property is returned" to the victim. *Id.* at 745. But the court agreed with the government that the district court did not abuse its discretion in entering a restitution order that would be reduced by the future proceeds from the real estate's sale. *Id.* In reaching this conclusion, the court noted that, had the offset amount been determined prior to its sale, the defendant would have been left with a high bill because market forces allowed the condominium to sell for $181,000, whereas at the time title transferred to the settlement company, similar condominiums were selling for $150,000 to $160,000. *Id.*

In *Himler*, the Third Circuit seemed to rely on the fact that the defendant was in a better position under the district court's approach because the real estate values had increased between the time title transferred and the resale. *Id.* at 745. Obviously, we have the converse here, but what *Himler's* reasoning illustrates is that with fluctuating real estate values, the only way to measure the true loss to the victim is by looking to the actual resale price of the collateral real estate. Under the MVRA, the actual loss is the appropriate measure of restitution.

b. The Tenth Circuit

In *United States v. James*, 564 F.3d 1237 (10th Cir. 2009), the Tenth Circuit also upheld a restitution

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[13] In *Himler*, the court also noted that the defendant had purchased the condominium at an inflated price ($193,833) while other similar condominiums were selling between $150,000 and $160,000. *Himler*, 355 F.3d at 744.

award that calculated the total loss by subtracting the eventual resale price of the collateral real estate from the initial loan proceeds. *Id.* at 1246-47. In *James*, the Tenth Circuit reasoned that "[b]ecause, in this case, the foreclosure price method more closely reflects the actual loss [the victim] experienced, we cannot say the district court's method of using that value was unreasonable or that it otherwise erred in using that valuation method in determining the amount of restitution under the MVRA." *Id.*

c. The Eighth Circuit

Similarly, in *United States v. Statman*, 604 F.3d 529 (8th Cir. 2010), the Eighth Circuit upheld the district court's use of the eventual proceeds from a foreclosure sale as the offset value. *Id.* at 538. In that case, the defendants had been charged with wire fraud in relation to a scheme to purchase a business. *Id.* at 532. Among other things, in purchasing the business they assumed a bond secured by real estate. *Id.* at 536. Following their conviction for fraud, at sentencing defendant Rund objected to the government's methodology for calculating restitution. *Id.* at 537. Then on appeal Rund argued that "the district court erred because the loss to [the victim] should not have been calculated based on the alleged foreclosure sale price but [, instead, on] the assessed value of the properties." *Id.* The court rejected Rund's approach, which, as the Eighth Circuit explained, "would have this court use the appraised value of the foreclosed property to calculate the loss amount, which would result in a lower restitution payment to [the victim]." *Id.* In rejecting Rund's approach, the Eighth Circuit stressed the overarching goal of the MVRA—making crime victims whole—and then concluded that "[u]nder the circumstances of this case, the district court's use of the

foreclosure sale price provided a fair and adequate representation of [the victim's] loss and satisfied the overarching goal of the MVRA, to make [the victim] whole." *Id.*

The *Himler*, 355 F.3d 735, *Statman*, 604 F.3d 529, and *James*, 564 F.3d 1237, decisions all support our conclusion today that the offset value is best determined by the money eventually recouped upon the resale of the collateral real estate. This conclusion is consistent with the plain meaning of the MVRA and also furthers the statutory goal of making the victims whole again. Accordingly, today we join the view of the Third, Eighth, and Tenth Circuits and hold that the offset value is the eventual proceeds recouped following a foreclosure sale.

B. Inclusion of Other Expenditures

In addition to challenging the district court's use of the eventual resale price of the foreclosed real estate as the offset value, Robers also argues on appeal that the district court erred in including various other expenditures in the restitution award related to the Grant Street real estate. The Inlet Shores restitution award was based solely on the difference between loan amount and the resale amount, so there is no additional issue there. But with the Grant Street real estate, the restitution awarded was based on the following figures:

Claim:

Unpaid Principal balance	$140,478.91
Accrued interest	$13,698.36
Attorney fees	$1,400.00
Property taxes	$2,478.10
Other expenses	$450.00
Hazard Insurance	$485.00
Property preservation	$736.54
Statutory Disbursement	$1,311.56
Less ending escrow balance	($1,823.56)
Total Claim paid:	$159,214.91

Additional expenses after MGIC took over ownership:

Insurance	$374.51
Utilities	$112.69
Title Commitment	$325.00
Broker price opinion	$119.00
Claim investigation costs	$715.00
Total Expenses:	$1,646.20

Recovery from sale:

Sales Price	$118,000.00
Broker's commission	($8,080.00)
Prorated taxes	($1,724.68)
Title Policy	($607.00)
Settlement charges	($679.39)
Net Proceeds	$107,908.93
Total Loss	$52,952.18

In challenging these line-item expenses, Robers merely argues that the district court did not adequately explain how or why they should be included. And then he stresses that consequential and incidental expenses are not recoverable. The only specific line-item expenses, though, for which he develops an argument are "attorney's fees" and "other expenses." This court has held that attorney's fees expended in pursuing litigation are not recoverable, *Shepard*, 269 F.3d at 887, but they are recoverable if they represent damage to the property or are incurred as part of an investigation for the prosecution. *Scott*, 405 F.3d at 620. Because we lack sufficient detail to know on which line these attorney's fees fall, we vacate that portion of the restitution award. Similarly, because we cannot know what "other expenses" means and thus whether they are recoverable, we vacate that portion of the restitution award as well.

We reject, however, Robers's claim that the district court did not adequately explain why it included the other miscellaneous expenditures in the restitution award. After stating that it had read the parties' restitution memoranda and the defense's objections, the district court explained:

> The trend is, I think—and the thrust of Seventh Circuit case law, and the thread that runs is becoming stronger in this fabric, is that these expenses aren't going to be considered as consequential .... As the government has argued, these are fraud cases. It was a fraud that was perpetrated, which resulted in all of these actions that had to be taken but for the fraud. And that's not putting a person, a victim in this type of case, in a better place. It's putting a victim back where the victim never should have gone and never would have been but for the conduct that was conducted

> by the defendant. . . . And I deem it to be the case in this case, as I deemed it to be in the Bradley Hollister case. . . . so consistent with the logic of it, I think that the logic is overwhelming, that the fraud was committed. The victim is owed, and he's owed the direct expenses—I'll call them direct expenses that flow from the fraud that would not have existed or not there—never would have been there.

Robers believes that this discussion is insufficient, citing *United States v. Hosking*, 567 F.3d 329 (7th Cir. 2009), wherein the government presented only a single document with general and vague descriptions of the victim's costs. *Id.* at 333. But the problem in *Hosking* was that the district court found that the costs were not appropriately included in restitution order and then, rather than determine the appropriate amount of restitution, merely cut the claimed costs in half. *Id.* at 334. Conversely, here the only component of the award that is unclear is the "other expenses" category, which we have vacated. And we reject Robers's argument that the remainder of the restitution order was not sufficiently explained.

As noted, other than his challenge to "attorney's fees" and "other expenses," Robers does not challenge individually the other line-item expenses, merely stating that they are all consequential or incidental expenses that cannot be recovered. We have held that consequential or incidental expenses are not compensable under the MVRA. *Shepard*, 269 F.3d at 887 ("Both § 3663A and its predecessor § 3663 have been understood to require restitution only for direct losses and not for consequential damages and the other effects that may ripple through the economy."); *United States v. Arvanitis*, 902 F.2d 489, 497 (7th Cir. 1990)

("In the case of restitution for offenses resulting in the loss of property, 18 U.S.C. § 3663(b) limits recovery to property which is the subject of the offense, thereby making restitution for consequential damages, such as attorneys fees, unavailable."). But we have also explained that the "direct" versus "consequential and incidental" demarcation is not exactly helpful. *United States v. Scott*, 405 F.3d 615, 620 (7th Cir. 2005). Rather, the better question is whether the injury is to "property," which is recoverable under the MVRA, or other losses, which are not. *Id.* 619-20.

In *Scott,* we explained this principle, while holding that an order of restitution appropriately included the cost of an audit:

> The audit expense, though a loss to Scott's employers, was not a gain to him. But it was a form of damage to the [victim-] employers' property. Suppose money was stolen from a bank and eventually returned, but the bank incurred a bookkeeping cost in determining whether the entire amount stolen had been returned. That cost would be a diminution in the value of the bank's property, caused by the theft, and would therefore be a proper item for restitution. See *United States v. Donaby*, 349 F.3d 1046, 1051-54 (7th Cir. 2003); *United States v. Rhodes*, 330 F.3d 949, 953-54 (7th Cir. 2003); *United States v. Hayward*, 359 F.3d 631, 642 (3d Cir. 2004). This case is no different.

Id. at 619.

Like *Scott*, we conclude in this case that the remainder of the line-item expenses fall on the injury-to-property side of the line. The property damaged by Robers's fraud was capital and to recoup that capital, Fannie Mae and then MGIC had to incur numerous expenses to safeguard, keep up, and dispose of the

collateral that secured the loan. The only way MGIC was able to regain its capital at the end of the day, at the value it recovered on resale, was by expending cash up front. For instance, if real estate taxes were not current, the buyer's offer would be lower by an equal amount. If title insurance were not provided, the purchase would be riskier and the buyer would be only willing to purchase at a lower price. If a realtor were not hired, the property would not be marketed as effectively, again leading to a lower amount. And maintenance and utilities expenses preserved the collateral, and insurance safeguarded the collateral while the victim attempted to mitigate the damage to its property. In other words, the amounts expended by the victim to achieve the final disposition of the collateral real estate were incurred solely to rectify, to the extent possible, the damage to the capital. These expenses are directly related to Robers's fraud and are thus recoverable.[14] Accordingly, we affirm the restitution award, other than the award for attorney's fees and "other expenses," which we vacate, and we

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[14] The Eighth Circuit in *United States v. Alexander*, 679 F.3d 721 (8th Cir. 2012), upheld a restitution award to HUD that included foreclosure expenses. The court in *Alexander*, though, held that foreclosure expenses were recoverable under the MVRA because HUD was a victim of the crime and "was responsible for making such a payment to the lender based on its guarantee of the mortgage loan." *Id.* However, in the case before us, the government seeks restitution to MGIC, not as a victim, but because it is subrogated to the lender's interest pursuant to 18 U.S.C. § 3664(j)(1). Being subrogated to Fannie Mae's interest, then, means that MGIC steps into the shoes of Fannie Mae and cannot recover merely because it paid Fannie Mae's insurance claim. *See Shepard*, 269 F.3d at 887. Thus, *Alexander's* analysis is inapplicable and, as we have done above, we have focused instead on the restitution due to MGIC not as an insurer, but as if it were the lender.

remand for entry of judgment consistent with this opinion.

III. Conclusion

Robers's fraud deprived his victims of cash. Under the MVRA, restitution of the property stolen—here cash—was mandatory. Because cash was stolen and cash was not returned to the victims until the collateral securing the fraudulent loans was sold, under the plain language of the MVRA the value of the property returned on the date of its return is the amount of cash recovered at the time the foreclosed real estate was eventually resold. In a stagnant, declining market, house values will decrease and this reduction in value of the real estate is a risk that falls on Robers, the one who defrauded the victims. The loss in value of the real estate and the various line-item expenses incurred by the victims while attempting to convert the collateral back to cash are directly caused by Robers's fraud and constitute recoverable damages to his property. Attorney's fees for collecting a debt, though, are not properly recoverable under the MVRA and "other expenses" may not be. Accordingly, we vacate that portion of the restitution award. For these reasons, we AFFIRM IN PART, VACATE IN PART, and REMAND to the district court for entry of a restitution order consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 10-3794

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN ROBERS,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 10 CR 95

Rudolph T. Randa, *Judge*

November 28, 2012

ORDER

Before: Daniel A. Manion, *Circuit Judge*; Diane S. Sykes, *Circuit Judge*

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by defendant-appellant, no judge in active service has requested a vote on the petition and all judges on the original panel have voted to deny rehearing.[1] The petition is therefore DENIED.

---

[1] Judge Flaum, although on the original panel, did not participate in the consideration of the petition for rehearing.

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
DEC 13 2013
OFFICE OF THE CLERK

No. 12-9012

IN THE

Supreme Court of the United States

BENJAMIN ROBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER

JEFFREY T. GREEN
JACQUELINE G. COOPER
DAVID R. KUNEY
JOSH C. HESS
JEFFREY S. BEELAERT
ADAM N. HALLOWELL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SUPREME COURT
PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611

CHRISTOPHER DONOVAN*
PRUHS & DONOVAN, S.C.
757 N. Broadway
Milwaukee, WI 53202
Donovanc34@hotmail.com
(414) 221-1950

JONATHAN E. HAWLEY
Chief Federal Public
Defender
DANIEL T. HANSMEIER
Assistant Federal
Public Defender
FEDERAL PUBLIC
DEFENDER'S OFFICE
CENTRAL DISTRICT OF
ILLINOIS
600 E. Adams Street,
2d Floor
Springfield, IL 62701

Counsel for Petitioner
* Counsel of Record

December 13, 2013

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QUESTION PRESENTED

Whether a defendant—who has fraudulently obtained a loan and thus owes restitution for the loan under 18 U.S.C. § 3663A(b)(1)(B)—returns "any part" of the loan money by giving the lenders the collateral that secures the money?

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OPINION AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming in part and vacating in part the order of the United States District Court for the Eastern District of Wisconsin, is reported at 698 F.3d 937 and reprinted in the Joint Appendix (J.A.) at 144. The court of appeals' order denying the petition for rehearing en banc is unreported and reprinted at J.A. 182. The district court's order is unreported and reprinted at J.A. 132.

JURISDICTION

The court of appeals entered its judgment on September 14, 2012. J.A. 143. Mr. Robers filed a petition for rehearing, which the court denied on November 28, 2012. J.A. 182. The petition for a writ of certiorari was timely filed on February 26, 2013. This Court granted certiorari on October 21, 2013 and has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 3663A and 3664 of Title 18 of the United States Code are reproduced in the appendix.

INTRODUCTION

Under its erroneous interpretation of the Mandatory Victims Restitution Act ("MVRA"), the sentencing court entered a ruinous order of restitution for Mr. Robers' mortgage fraud that would make his lenders whole for the consequences of the great recession, even though the properties involved were foreclosed upon before that recession began. While the MVRA requires a defendant to pay restitution for property that victims have lost as a consequence of the defendant's fraud, it also includes

an offset provision that requires courts to reduce that restitution award by the "value (as of the date the property is returned) of any part of the property that is returned . . . ." 18 U.S.C. § 3663A(b)(1)(B)(ii).

For $500 per transaction, Mr. Robers played the role of a straw buyer for two properties in a fraud scheme that took advantage of the real-estate price bubble in the middle part of the last decade. Because Mr. Robers defaulted, the lenders foreclosed. The lenders' seizure of the collateral for the loans constitutes a "return" of at least part of the property to those lenders: as collateral, the houses were an agreed-upon and legally recognized substitute for the loan money. Moreover, the lenders recouped at least part of the lost loan money when they purchased the houses during the sheriff's sales as part of the foreclosure process and thus took title to the assets in which Mr. Robers had invested the loan money. The offset provision, § 3663A(b)(1)(B)(ii), therefore required the district court to reduce the restitution amount by the houses' values on the transfer dates.

The Seventh Circuit, however, concluded that Mr. Robers did not return any part of the lenders' property at the time he transferred the houses to the lenders because that property was not the same thing as the funds that the lenders advanced. Thus, it reasoned, Mr. Robers was not entitled to any offset under § 3663A(b)(1)(B)(ii) until the lenders recouped funds in later third-party sales of the property that occurred only after the recession had done substantial damage to the value of the properties. The court of appeals left in place the order for Mr. Robers to pay the difference between the loan amounts and the proceeds of the much later third-party sales of the property during the recession.

Section 3663A(b)(1)(B)(ii) cannot be read so narrowly. The provision requires an offset once a defendant gives the victim substitute property, such as mortgage collateral, that compensates the victim for the loss. The provision's language is broad in that it expressly applies when "any part" of the property "is returned." Further, the offset provision itself appears in a subsection of the statute that applies only to situations, like this one, where return of the original property is impracticable, impossible, or inadequate, and a related provision expressly allows for the return of "in-kind" property, including "replacement" property. Moreover, unless the Court reads the statute to require an offset once a mortgage fraud defendant returns collateral, the statute will require such defendants to pay for losses their crimes did not proximately cause.

STATEMENT OF THE CASE

A. Statutory Background

A federal court has no inherent power to order restitution in criminal cases. *United States* v. *Zangari*, 677 F.3d 86, 91 (2d Cir. 2012). It may do so only as expressly authorized by statute. *United States* v. *Papagno*, 639 F.3d 1093, 1096 (D.C. Cir. 2011). In 1996, Congress enacted the MVRA, 18 U.S.C. § 3663A; Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1227, as a supplement to an earlier statute, the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. §§ 3663 and 3664; Act of Oct. 12, 1982, Pub. L. No. 97-291, 96 Stat. 1248, 1253.[1]

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[1] The VWPA was originally codified at 18 U.S.C. §§ 3579 and 3580, but was recodified, effective November 1, 1987, by the

The MVRA substantially tracks the language of the VWPA. *United States* v. *Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004). The primary difference between the VWPA and the MVRA is that the MVRA provides for "mandatory" restitution in certain cases, including, *inter alia*, offenses against property committed by fraud or deceit. § 3663A(c)(1)(A)(ii). This case involves mortgage fraud, thus triggering § 3663A.

The specific provision this Court must interpret is 18 U.S.C. § 3663A(b)(1), which requires that a defendant do one of two things "in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense." First, "return the property to the owner." § 3663A(b)(1)(A). Second, where the return of the property is "impossible, impracticable, or inadequate," pay an amount equal to:

> (i) the greater of—
>
> (I) the value of the property on the date of the damage, loss, or destruction; or
>
> (II) the value of the property on the date of sentencing, less
>
> (ii) the value (as of the date the property is returned) of any part of the property that is returned;

§ 3663A(b)(1)(B). This latter provision—the "offset provision"—is at the heart of this case. J.A. 145.

Section 3663A(d) expressly incorporates § 3664, which provides procedures for ordering restitution. Section 3664(f)(3)(A) allows courts to fashion restitution orders to include "a single, lump-sum

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Sentencing Reform Act of 1984, 98 Stat. 1987. *Hughey* v. *United States*, 495 U.S. 411, 413 n.1 (1990).

payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments." § 3664(f)(3)(A). In-kind payments "may be in the form of—(A) return of property; (B) replacement of property; or (C) if the victim agrees, services rendered to the victim or a person or organization other than the victim." § 3664(f)(4). And so, Congress provided courts with flexibility to fashion restitution awards that provide victims "the full amount of [their] losses," § 3664(f)(1)(A).

Although the MVRA generally requires restitution, it is not an inexorable command. Instead, there are a number of limitations on restitution awards. For instance, federal courts need not order restitution if "the number of identifiable victims is so large as to make restitution impracticable," § 3663A(c)(3)(A), or if "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." § 3663A(c)(3)(B).

Restitution orders under the MVRA are also limited to a "victim" of the offense, defined as "a person directly and proximately harmed as a result of the commission of an offense," including "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." § 3663A(a)(2). In other words, there is a proximate causation component to restitution, and it is the prosecution's burden to prove causation, *United States* v. *Speakman*, 594 F.3d 1165, 1171 (10th Cir. 2010), as it is the prosecution's burden "of demonstrating the amount of the loss sustained by a victim as a result of the offense . . . ." § 3664(e).

This proximate causation requirement extends to the amount of restitution that may be ordered because Congress has not authorized federal courts "'to order restitution to victims in excess of their losses.'" *United States* v. *Gonzalez*, 647 F.3d 41, 66 (2d Cir. 2011) (quoting *United States* v. *Pescatore*, 637 F.3d 128, 139 (2d Cir. 2011)). Such an order would constitute an illegal sentence; "'the amount causally linked to the offense of conviction'" establishes the statutory maximum amount for purposes of restitution. *United States* v. *Freeman*, 640 F.3d 180, 193 (6th Cir. 2011) (quoting *United States* v. *Gordon*, 480 F.3d 1205, 1210 (10th Cir. 2007)).

Congress sought to make the statute balanced in other ways. It requires the probation officer to inform the district court of "the economic circumstances of each defendant," § 3664(a), and it permits district courts to fashion restitution orders in light of those circumstances, § 3664(f)(2), (3)(B). As here, if multiple defendants cause a victim's loss, a district court may "apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant," rather than impose restitution in the full amount on all defendants. § 3664(h). Again, while the MVRA undoubtedly aims to provide victims "the full amount of [their] losses," § 3664(f)(1)(A), it does so pragmatically, not rigidly, and with the interests of all parties (including the courts) in mind.

B. Factual Background

In the early 2000s, rising home prices and a mortgage-industry drive "to hasten the mortgage loan process" led to an "easing" of mortgage-lending

standards nationwide.[2] The relaxed standards prompted a nationwide wave of mortgage fraud.[3]

In 2004, James Lytle and Martin Valadez created the scheme that ultimately involved Mr. Robers. Presentence Investigation Report at 3, *United States* v. *Robers*, No. 10-00095 (E.D. Wis. Oct. 12, 2010) [hereinafter PSR]. Lytle and Valadez approached homeowners as putative "consultants" who could maximize the value of the homes. They also prepared false loan applications for individuals they recruited as "straw buyers." The straw buyers then submitted the false applications in order to qualify for a loan under the relaxed standards. PSR at 3 Once the lenders approved the loans and the straw buyers purchased the properties at the agreed-upon prices, Lytle and Valadez collected up to $20,000 in "consulting fees" from the original homeowners as part of the deal. PSR at 3; Plea Agreement at 3, *United States* v. *Lytle*, No. 07-00113 (E.D. Wis. May. 15, 2007). The straw buyers eventually defaulted on the loans.

When Lytle and Valadez initially approached Mr. Robers, he was 19 years old, held only a GED, and earned $7.25 an hour on a family farm and as a ski-lift operator. PSR at 8, 10. He hoped to start a landscaping business but needed money to buy a lawnmower. PSR at 8. Thus, when a conspirator who worked with Mr. Robers painting houses offered him $500 per house to be a straw buyer, Mr. Robers accepted the offer. PSR at 4. Mr. Robers served as a straw buyer for two homes.

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[2] *2007 FBI Mortgage Fraud Report*, Federal Bureau of Investigations (April 2008), http://www.fbi.gov/stats-services/publications/mortgage-fraud-2007.

[3] Id.

911 Grant Street. Mr. Robers applied to Paragon Home Lending for a loan to buy a house at 911 Grant Street, Lake Geneva, Wisconsin. Mr. Robers submitted a loan application that misreported his income and job. PSR at 4, 10. Paragon thereafter approved the application and loaned Mr. Robers $141,000, secured by a mortgage on the Grant Street house. PSR at 4; J.A. 38. The mortgage instrument expressly stated that the lender would waive any deficiency claim if Mr. Robers waived his right of redemption, as required by Wis. Stat. § 846.101. Complaint – Mortgage at 12, *Mortg. Elec. Reg. Sys., Inc. as nominee for Paragon Home Lending, LLC* v. *Robers*, No. 05-01072 (Wis. Cir. Ct., Walworth Cnty., Dec. 6, 2005) [hereinafter *Paragon* Action]. In March 2005, Mr. Robers purchased the house. PSR at 2.

Mr. Robers defaulted on the loan. In December 2005, Paragon (acting through a nominee) filed a judicial-foreclosure action in state court. Complaint, *Paragon* Action (Dec. 6, 2005). Paragon "elect[ed] to waive judgment for any deficiency which may remain due the plaintiff after the sale of the mortgage premises." *Id.* ¶ 9.

In March 2006, the state court entered judgment against Mr. Robers and ordered a sheriff's sale of the property. Findings of Fact, Conclusions of Law and Judgment at ¶ 5, *Paragon* Action (March 10, 2006). The state court judgment expressly prohibited Paragon or its successors from seeking damages beyond the return of the collateral. *Id.* at ¶ 10. Paragon thereafter assigned to Fannie Mae both the judgment and Paragon's bid at the upcoming foreclosure sale. See Assignment of Bid, *Paragon* Action (Sept. 11, 2006); J.A. 60.

In September 2006, the Walworth County sheriff conducted a foreclosure sale for the Grant Street

property. Sherriff's Report of Sale on Foreclosure, *Paragon* Action (Sept. 18, 2006). Fannie Mae successfully bid $158,184.02 (a "credit bid," in foreclosure-law parlance), which included the total amount then due on the mortgage and additional fees and costs. *Id.*; Affidavit to Confirm and for Additions to Judgment, *Paragon* Action (Sept. 15, 2006). Fannie Mae then had title, control and possession of the collateral. Fannie Mae thereafter transferred the house's title to its loan insurer, Mortgage Guarantee Insurance Corporation ("MGIC"), in exchange for $159,214.91. J.A. 65.

900 Inlet Shores. Mr. Robers applied for a loan to buy a house at 900 Inlet Shores Drive, Delavan, Wisconsin. PSR at 3. The application falsely reported, *inter alia*, his income. J.A. 14. A lender approved the application and loaned Mr. Robers approximately $330,000, secured by a mortgage on the Inlet Shores property. PSR at 3; J.A. 38, 91. This mortgage also contained a contractual waiver of the right to assert a deficiency claim, such that the lender did not anticipate a "return of cash" in the event of foreclosure. Complaint – Mortgage at 13, *Mortg. Elec. Reg. Sys., Inc., as Mortgagee of Record and as nominee of the Serv. GMAC Mortg. Co.* v. *Robers*, No. 05-01040 (Wis. Cir. Ct., Walworth Cnty., Nov. 30, 2005) [hereinafter *GMAC* Action]. Mr. Robers purchased the house in June 2005. J.A. 85, 88.

Mr. Robers defaulted on the loan. In November 2005, the mortgage holder for the Inlet Shores property filed a foreclosure action in Wisconsin state court. See Complaint, *GMAC* Action (Nov. 30, 2005). The mortgage holder "waiv[ed] judgment for any deficiency." *Id.* at ¶6. The prosecution introduced testimony at sentencing that, on December 29, 2005, the mortgage holder sold the note to American Portfolio

for $330,000. J.A. 102. According to the prosecution, American Portfolio (or its predecessor in interest) later purchased the Inlet Shores property at a February 2006 sheriff's sale, after which Mr. Robers no longer held title. J.A. 87-89, 95, 97-98.[4]

Eventual Resales. After the sheriff's sales in September and February 2006, the lenders initially chose to hold the properties. In late 2006 and 2007, the real estate market collapsed nationwide.[5] Then, in August 2007, MGIC sold the Grant Street property for $118,000. J.A. 65-66.[6] According to the prosecution, American Portfolio waited until October 2008 to sell the Inlet Shores property at a price of $164,000. J.A. 89-90.

C. District Court Proceedings

In May 2010, the prosecution filed an Information charging Mr. Robers with conspiracy to commit wire fraud. See generally 18 U.S.C. §§ 371, 1343. The Information alleged that Mr. Robers, as part of the conspiracy, submitted a fraudulent loan application in order to buy the Inlet Shores house. Information,

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[4] The record is unclear on these points. There is some indication that the records introduced by the prosecution at sentencing may pertain to a prior, senior mortgage on the Inlet Shores property.

[5] Press Release, Standard & Poor's, Broadbased, Record Declines in Home Prices in October According to the S&P/Case-Shiller Home Price Indices 1 (Dec. 26, 2007), *available at* http://online.wsj.com/public/resources/documents/CSHomePrice_Release_20071226.pdf; Steven Gjerstad & Vernon L. Smith, *From Bubble to Depression?*, Wall St. J., Apr. 6, 2009, *available at* http://online.wsj.com/article/SB123897612802791281.html.

[6] Landshark, Walworth Cnty., Wis., Doc. No. 717620, https://rodapps.co.walworth.wi.us/LandShark, (last visited Feb. 20, 2013) (subscription required).

United States v. *Robers*, No. 10-00095 (E.D. Wis. May 18, 2010), ECF No. 1. Pursuant to a written plea agreement, Mr. Robers waived indictment and agreed to plead guilty to the Information. J.A. 13. The prosecution agreed that Mr. Robers was a minimal participant in the conspiracy and that a non-custodial sentence was sufficient. J.A. 19-20. In the plea agreement, Mr. Robers acknowledged that the prosecution had identified MGIC and American Portfolio as victims of the conspiracy for restitution purposes in his case. J.A. 21-22.

The prosecution sought restitution under the MVRA. As noted, that statute requires a defendant like Mr. Robers, who commits fraud that "result[s] in . . . loss . . . of property," to repay the property-owner victims for the lost property. § 3663A(b)(1)(B). The victims here, the prosecution asserted, were MGIC and American Portfolio—the original lenders' successors in interest. J.A. 38-39, 48. And the property lost was the "money that was advanced to [Mr. Robers] for the purpose of purchasing" the houses. J.A. 49. The prosecution therefore argued that Mr. Robers must pay MGIC and American Portfolio for the outstanding balance on the home loans, plus interest and other expenses: $500,952.18. J.A. 49, 64-66, 85-87; see also Gov't Sent. Ex. 1, *United States* v. *Robers*, No. 10-00095 (E.D. Wis. Nov. 22, 2010), ECF 13-1.

The prosecution acknowledged, however, that the MVRA also required the district court to reduce the restitution judgment by "the value (as of the date the property is returned) of any part of the property that is returned . . . ." § 3663A(b)(1)(B)(ii). J.A. 51. The prosecution therefore recommended reducing the restitution award by the amounts that, by its calculation, MGIC and American Portfolio recouped by even-

tually reselling the houses: $118,000 and $164,000, respectively. See J.A. 49-50, 65-66, 87. Thus, the prosecution proposed that Mr. Robers pay $218,952.18 in restitution. J.A. 50, 117.

Mr. Robers objected to the prosecution's calculation. Among other things, he argued that the district court should reduce the restitution award by the houses' values in 2006, when the lenders acquired title through state foreclosure proceedings, rather than in 2007 or 2008, when the lenders resold the houses. J.A. 35-36, 97, 113-14. He explained that the real-estate bubble had burst between those dates, so the later resale prices were too low. J.A. 96-97.

Mr. Robers also argued that the district court should apportion the restitution award among the conspirators and order him to pay $4800. J.A. 31. He noted that other conspirators planned the scheme and were involved in "nearly 20 fraudulent transactions." J.A. 30. Mr. Robers, on the other hand, knew little about the conspiracy and was involved in only two transactions. J.A. 30.

But the district court rejected both arguments and adopted the prosecution's restitution recommendation. J.A. 117-21.

D. Seventh Circuit Proceedings

The Seventh Circuit reviewed the restitution issue de novo. J.A. 150. The court affirmed the district court and held that "the restitution amount is reduced by the eventual cash proceeds recouped once any collateral securing the debt is sold," not by the value of the houses once the defendant transfers them to the victims. J.A. 152. The court based this conclusion on its view of "the plain language of the MVRA." J.A. 152 Specifically, the court reasoned that "the property" in the offset provision must mean

the property originally taken from the victim. J.A. 152. Only this interpretation, the court stated, "gives the phrase 'the property' a consistent meaning throughout the statute: It always means 'the property stolen.'" J.A. 153. The court then explained that the property stolen from the lenders was cash, not the houses that served as collateral, and that "the cash was returned to the victims only when the collateral houses securing the loans were eventually resold." J.A. 153.

The court also rejected the argument that "conceptually, obtaining title to real estate is the same as receiving cash." J.A. 170. The court explained that "real estate is not liquid; it is not what was stolen; [and] it is not what the victim wants." J.A. 170. Additionally, the court added, the real estate "does not benefit the victim in any way until it is turned back into cash upon resale." J.A. 170.

Finally, the court of appeals held that its interpretation was consistent with the statute's "goals." J.A. 154-55. First, the court said that its interpretation ensured that restitution awards would make victims whole. Unless the "offset amount . . . is the cash recouped following" resale of the houses, "the victims would not be made whole again because eventual sale proceeds could be . . . woefully inadequate." J.A. 154-55. Second, the court said that its interpretation would only hold defendants responsible for losses their crimes proximately cause. J.A. 155. The court seemed to acknowledge that its interpretation requires mortgage-fraud defendants to pay for market-driven declines in home prices between foreclosure and eventual resale of the houses. J.A. 155. But the court held that the defendant's crime proximately caused those declines because the victim lenders "would not have loaned

the money in the first place" absent the defendant's fraud. J.A. 155.

SUMMARY OF THE ARGUMENT

The court below incorrectly held that real estate collateral returned to a lender at foreclosure does not offset the restitution amount of a mortgage-fraud defendant.

The text and structure of the MVRA demonstrate that a defendant must receive an offset for the value of collateral property at the time the lender takes title. The statute allows the defendant to return substitute property—that is, property that compensates the victim for the loss, such as mortgage collateral. The offset provision's use of the word "returned" allows a defendant to convey substitute property, especially because Congress could have used a more specific phrase such as "property reclaimed by the victim," but did not. Further, § 3663A(b)(1)(B), which contains the offset provision, applies only when the return of the property originally lost is "impossible, impracticable, or inadequate." To prevent this limitation from narrowing subparagraph (B) to an improbably small range of situations, the offset provision must cover cases in which the defendant has returned substitute property. This reading is confirmed by § 3664, in which Congress allows "replacement of property" to serve as an "in-kind payment" under the MVRA, showing its understanding that a defendant need not return the original lost property to make a victim whole. And reading the offset provision as Mr. Robers does ensures that defendants pay only for losses their crimes proximately cause.

Reading § 3663A(b)(1)(B)(ii) to exclude any offset for the return of mortgage collateral would create

unwarranted tensions with state mortgage law. Federal statutes such as the MVRA are interpreted with deference to well-understood state-law principles, especially those dealing with real property. Mortgage laws in Wisconsin, as elsewhere, permit a lender to foreclose on collateral in an effort to take title to it as repayment. In a judicial foreclosure, the proceeds of a sheriff's sale of the property are applied to the debt owed to the lender—especially when, as here, a lender "credit-bids" for the collateral property (which is legally the same as the return of cash) and takes title itself. Indeed, in states such as Wisconsin, when (as here) the borrower has waived his redemption rights, lenders agree to look only to the return of the collateral, and not to any cash in the form of a deficiency claim.

Alternatively, if § 3663A(b)(1)(B)(ii) does require defendants to return the property originally lost (*i.e.*, the loan money), the Court should still reverse. The provision requires courts to reduce restitution awards once "any part" of the original property is returned. § 3663A(b)(1)(B)(ii). At least a "part" of the loan money is returned once the victim lenders foreclose on the houses that the defendant purchased with the loans. The victims recover the economic value that the loan money stored temporarily and that was transferred to the houses when the defendant bought them. The defendant is therefore entitled to offset the restitution amount by the houses' values as of that date.

The Seventh Circuit nonetheless read the offset provision to require the return of the exact property taken from the victim, and ignored the transfer of the loan proceeds' value into the houses. But that reading cannot be squared with the text and structure of the surrounding statute. Moreover, the

court's suggestion that mortgage lenders "do not want" the collateral as repayment was contrary to the lenders' explicit statutory and contractual undertaking to look only to the collateral for the return of the loan.

The Seventh Circuit's interpretation also defeats the statute's dual purpose of making victims whole without granting them windfalls. Under that interpretation, a court may reduce the restitution award only once the victims resell the houses—which might occur years after sentencing. That possible delay means the sentencing court must either refuse to order restitution at all or instead order restitution for the full outstanding loan amount. The first option leaves the victim uncompensated; the second could allow the victims to both collect all of the lost loan money from the defendant and later resell the houses for a windfall.

Lastly, even if the statute's text, structure, and purpose did not make plain its meaning, the rule of lenity would require the rejection of the Seventh Circuit's position. This Court should reverse and hold that courts must reduce restitution awards in the circumstances here once the defendant transfers the houses' titles to the victims.

ARGUMENT

I. SECTION 3663A'S TEXT, STRUCTURE, AND PURPOSE ENTITLE A DEFENDANT TO AN OFFSET FOR A MORTGAGE-FRAUD RESTITUTION AWARD ONCE THE DEFENDANT RETURNS COLLATERAL TO THE LENDER.

In 18 U.S.C. § 3663A(b)(1)(B)(ii), Congress required offsets to restitution awards for the value of property

"that is returned." This provision, the structure of § 3663A, and the rest of the federal restitution scheme require that when a defendant owes restitution for a fraudulently obtained mortgage loan, the amount of the restitution award must be offset by the value of the collateral on the date that the collateral is returned to the lender through state foreclosure proceedings. This reading of the statute comports with established principles of state foreclosure law and avoids the anomalous results that will occur under the Seventh Circuit's contrary reading.

A. Section 3663A(b)(1)(B)(ii) Provides That Courts Must Offset Restitution Orders For "Property That Is Returned."

The plain text of the offset provision under 18 U.S.C. § 3663A(b)(1)(B)(ii) is the starting point. *E.g.*, *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk*, 132 S. Ct. 1670, 1680 (2012). That text requires a sentencing court to offset "the value (as of the date the property is returned) of any part of the property that is returned." § 3663A(b)(1)(B)(ii). For three reasons, the provision's text requires courts to grant an offset once the defendant returns substitute property—such as collateral—that compensates the victim for the loss. First, the word "returned" denotes repayment of a debt, but not necessarily a conveyance of the same property. Second, Congress' use of the word "any"—as in "any part of the property that is returned"—means, according to this Court, that Congress intended to remove limitations of the sort that the Seventh Circuit imposed here. Third, Congress drafted the offset provision in passive language when it provided for offset of "property that is returned," and a foreclosure represents a return,

via sheriff's auction, of the very collateral used to secure the loan that was the subject of the fraud.

1. The word "return" has a broad reach. To "return" means "to repay or pay back in some way, esp[ecially] with something similar." 12 *Oxford English Dictionary* 806 (2d ed. 1989); see also, *e.g.*, *Webster's Third New International Dictionary* 1941 (1993) ("to give or perform (something) in return: repay"). The word is not limited to the return of items formerly in another person's possession, but can include the giving of property to replace property previously received from that person. Examples of this usage abound.[7] This broad meaning is no surprise, because the word "returned" is often used in a context other than giving back the same property. When an indictment "is returned," for instance, the grand jury does not give the indictment back to its former owner. See, *e.g.*, *United States* v. *Hills*, 618 F.3d 619, 629 (7th Cir. 2010) ("The constitutional right to a speedy trial is triggered when an indictment is returned against a defendant."); Fed. R. Crim. P. 31(a) ("The jury must return its verdict to a judge in open court.").

Because the word "returned" implies a completed action, Congress also made clear that a victim must actually accept the property; it is not enough to offset restitution for a defendant simply to offer property that the victim has no desire to take. Cf. *United States* v. *Oren*, 893 F.2d 1057, 1066 (9th Cir. 1990) (granting offset credit for replacement property only

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[7] *See, e.g.*, *United States* v. *Bennett*, 708 F.3d 879, 890 (7th Cir. 2013) (discussion about "returning" money to codefendant drug dealers where these dealers never had the money in the first place); *United States* v. *Vadnais*, 667 F.3d 1206, 1209 (11th Cir. 2012) (discussion of what a defendant expected "in return" for images of child pornography).

if victim chooses to accept it). But when a victim does accept replacement property, and the property "is returned," the value of the property—such as collateral secured by a mortgage loan—offsets the restitution award as of the date of the property's return. As explained below, a narrower reading of the provision would contravene the purposes of restitution to compensate victims, but not overcompensate them. See *infra* Section I.H.

2. The word "any" in the phrase "any part of the property that is returned" confirms that a sentencing court must grant offset credit for all of the "returned" substitute property. The word "any" "'has an expansive meaning, that is, one or some indiscriminately of whatever kind.'" *Dep't Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131 (2002) (internal quotation marks omitted) (quoting *United States* v. *Gonzalez*, 520 U.S. 1, 5 (1997)). Congress' "use of 'any' to modify" "part of the property that is returned" easily accommodates the inclusion of collateral secured by a loan as offset on the date the collateral "is returned." See, *e.g.*, *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1332 (2011) (interpreting the phrase "any complaint" broadly to include an oral complaint); *Hui* v. *Castaneda*, 559 U.S. 799, 806 (2010) (discussing the broad reach of the word "any"); *Worth Bros. Co.* v. *Lederer*, 251 U.S. 507, 509 (1920) (defining the phrase "any part" to include all components "necessary to constitute a thing . . . .").

3. Real-estate collateral in a mortgage-fraud case fits comfortably within these broad definitions—particularly taking into account the expectations of the parties to a mortgage transaction. Each lender in this case treated the collateral as a return of its loan proceeds during foreclosure. The mortgage documents in each transaction gave the lender a right

to foreclose on the home in full or partial repayment of its loan. Complaint – Mortgage at 3, *GMAC* Action (Nov. 30, 2005); Complaint – Mortgage at 3, *Paragon* Action (Dec. 6, 2005). When the loan went into default, each lender brought a foreclosure action against Mr. Robers and acquired title to the collateral property via judicial foreclosure. In each case, the lender waived its right to seek a deficiency judgment against Mr. Robers, because Wisconsin law permits an accelerated foreclosure process if deficiency is waived.[8] See Wis. Stat. § 846.101. Finally, at the foreclosure auction, each lender purchased the property itself at the sheriff's sale by credit-bidding, a transaction which is the "'same as if the secured creditor has paid cash and then immediately reclaimed that cash . . . .'" *In re Spillman Dev. Grp., Ltd.*, 401 B.R. 240, 253 (Bankr. W.D. Tex. 2009) (quoting *In re HNRC Dissolution Co.*, 340 B.R. 818, 824-25 (E.D. Ky. 2006)), *aff'd*, 710 F.3d 299 (5th Cir. 2013). Thus, the credit bid represented a return of the property in the very real-world form of an offset of the sale price against the loan amount on the lenders' books, *at the time of the foreclosure sale.* Further, state mortgage laws, including Wisconsin's, also dictate that when a lender forecloses and takes title to the property, foreclosure law values the property as of the date the lenders take title, not as of

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[8] Under Wisconsin law, this waiver meant that the lenders accepted the houses as full satisfaction of their claims: they could not receive, and did not expect to receive, any further recovery against Mr. Robers beyond the foreclosed houses. See Wis. Stat. § 846.101(2) ("When plaintiff so elects [to waive a deficiency judgment], judgment shall be entered as provided in this chapter, except that no judgment for deficiency may be ordered therein nor separately rendered against any party who is personally liable for the debt secured by the mortgage . . . .").

the later date the property is sold to a third party. See *infra* Section I.E.

Given the function of collateral under mortgage agreements and state mortgage laws, the Seventh Circuit's translation of "is returned" to "is recouped" is untenable. See J.A. 152 ("[T]he restitution amount [would be] reduced by the eventual cash proceeds *recouped* once any collateral securing the debt is sold.") (emphasis added). Congress could have narrowed the qualifying forms of offset by using the more precise language suggested by the Seventh Circuit, in the form of "recouped" or "reclaimed." Congress also could have achieved that result by using active language such as "property that the defendant returns" or "property that the victim reclaims or recoups." But it did neither. See, *e.g.*, *Credit Suisse Sec. LLC* v. *Simmonds*, 132 S. Ct. 1414, 1420 (2012) ("Had Congress intended this result, it most certainly would have said so."). Instead, Congress' passive and much broader language, enacted against a backdrop of mortgage law and practice, indicates that a foreclosure sale is the point at which some part of the mortgage loan "is returned" to the victim lenders.

B. The Offset Provision Applies To The Return Of Substitute Property Because It Applies Only When Return Of The Original Property Is "Impossible, Impracticable, Or Inadequate."

The text and structure of § 3663A(b)(1) demonstrate that Congress intended to compensate victims for losses via the return of substitute property, including collateral secured by a loan, as of the date that property is returned. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) (statutory interpretation requires examination of "the specific

context in which that language is used, and the broader context of the statute as a whole"); see also *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., LTD*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ."). The structure makes clear that restitution can be awarded even if the return of the property originally lost is "impossible, impracticable, or inadequate." The statute thus contemplates that substitute property that compensates the victim offsets a restitution award.

The offset provision, § 3663A(b)(1)(B)(ii), applies only in particular situations, a limitation which suggests that the provision allows return of substitute property. If a crime covered by the MVRA "result[s] in damage to or loss or destruction of property of a victim," § 3663A(b)(1), the district court can order the defendant to "return the property to the owner . . . or someone designated by the owner . . . ." § 3663A(b)(1)(A). However, if "return of the property under subparagraph (A) is *impossible, impracticable, or inadequate*," § 3663A(b)(1)(B) (emphasis added), subparagraph (B) applies. Under subparagraph (B), a defendant must "pay an amount equal to" "the value of the property" on the applicable date, § 3663A(b)(1)(B)(i), minus "the value (as of the date the property is returned) of any part of the property that is returned . . . ." § 3663A(b)(1)(B)(ii).

Only if return of the property originally lost is "impossible, impracticable, or inadequate" will the offset provision of § 3663A(b)(1)(B)(ii) apply. If "property" in that provision referred only to the property originally lost, as the Seventh Circuit held, then the offset provision would apply only in rare

cases, such as those in which the defendant has disposed of some of the original property but has kept some other divisible part of it. There is no indication that Congress meant § 3663A(b)(1)(B)(ii) to have such a narrow range of application. Rather, Congress meant clause (B) to allow replacement compensation that equates to the "value" of the original property.

The restitution in this case was awarded under clause (B) because it was undisputed that the actual funds extended to Mr. Robers by the lenders could not be recovered—as the lenders fully expected, because they contractually obligated Mr. Robers to use the money to buy houses.[9] The very purpose of clause (B) is to address situations like this one, in which the actual property lost or stolen *cannot* be returned to the victim. Because of the clause's role in the structure of § 3663A(b)(1), an interpretation of the offset provision that requires a return of the actual "property originally taken from the victim," J.A. 152, is a non sequitur.

The Seventh Circuit thought this construction untenable because, in its view, the phrase "the property"

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[9] As a result, the Seventh Circuit's statement that "the property taken from the victims was cash," J.A. 153, was not strictly true: the money could not be used for any purpose Mr. Robers chose, but was earmarked for the purchase of the homes. In a typical purchase-money mortgage, the borrower never sees any of the loan proceeds, and of course is never given "cash" in the sense of dollar bills; the mortgage lender sends the funds directly to the sellers or its agents. See Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 9.1, at 781-83 (4th ed. 2001). The prosecution's Information stated that purchase of the Inlet Shores property involved a wire transfer directly from the lender to a title service company, Information at 1, *United States* v. *Robers*, No. 10-00095 (E.D. Wis. May 17, 2010), and there has been no suggestion that the Grant Street transaction occurred differently.

must have "a consistent meaning throughout the statute." J.A. 153. On that view, the word "property," when used earlier in the statute, refers to the specific property lost by the victim. See § 3663A(b)(1)(A) (requiring defendant to "return the property to the owner of the property or someone designated by the owner . . . ."). But even if that were so, the word "property" necessarily takes a broader meaning in subparagraph (B)(ii) than it does when used in clause (A)—precisely because clause (B) applies only when compliance with clause (A)'s provisions is "impossible, impracticable, or inadequate."

The Seventh Circuit applied the "presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932); see J.A. 153. But that "presumption is not rigid" and "readily yields" where, as here, the structure of the statute compels another reading. *Atl. Cleaners*, 286 U.S. at 433. "Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Id.*; see also *Robinson*, 519 U.S. at 342-43 (holding that term "employees" includes former employees in some sections of Title VII of Civil Rights Act, but excludes former employees in other sections). Here, the Seventh Circuit improperly treated the same-meaning presumption as an ironclad rule and strove to give "the property" an identical meaning throughout the statute even in the face of contrary evidence concerning the structure of § 3663A(b)(1)—and, as shown below, the broad statutory language

construing "replacement" property as an in-kind restitution "payment."

The implausibility of the Seventh Circuit's statutory construction is confirmed by the fact that it did not actually adhere to it. The court stated that the offset provision is strictly limited to returns of "the property originally taken from the victim." J.A. 152. It is undisputed, however that the "original" property that was at issue in the case—the money loaned to Mr. Robers in 2005—was not returnable and was not returned. The money that the lenders eventually received in 2007 and 2008 from the sales of the collateral properties was the *same type* of property that they lost, but it was not a return of the original loan proceeds. To contend otherwise is to ignore that: (1) the original loan proceeds were invested in the houses; and (2) the money that the lenders eventually received was the result of wholly different transactions with third parties. Therefore, in order to find the offset provision applicable at all in this case under its own "plain language" construction, the Seventh Circuit construed the offset provision as requiring return of the same *type* of property originally taken from the victim, not solely return of *the* property originally taken. The Seventh Circuit's departure from its own purported interpretation underscores the unsoundness of that reading.

C. Section 3664 Confirms That Congress Understood "Replacement" Property, Such As Mortgage Collateral, To Be An Acceptable "In-Kind" Return Of The Property.

Other provisions of the MVRA confirm that Congress viewed payment of "replacement" property to be an acceptable "in-kind" return of property. While § 3664, the procedural companion statute to

§ 3663A, demonstrates Congress' intent to adopt a pragmatic, workable restitution scheme aimed at awarding "the full amount of each victim's losses," § 3664(f)(1)(A), that section also expressly contemplates and approves of the payment of substitute property that compensates the victim for the loss, such as mortgage collateral at sentencing. This indicates that previously returned collateral should also qualify as an offset under § 3663A.

Section 3663A(d) requires courts to enforce the MVRA "in accordance with" 18 U.S.C. § 3664. Section 3664(f)(3) provides that a restitution order may require "a single, lump-sum payment, partial payments at specified intervals, *in-kind payments*, or a combination of" types of payments. § 3664(f)(3)(A) (emphasis added). Section 3664(f)(4), in turn, states that:

> An in-kind payment described in paragraph (3) may be in the form of—
>
> (A) return of property;
>
> (B) replacement of property; or
>
> (C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

Section 3664(f)'s approval of "replacement of property" and "return of property" as a means of restitution shows that Congress did not intend to require defendants to return the exact property, or even the exact form of property, that the victim lost. See *United States* v. *Simmonds*, 235 F.3d 826, 832 (3d Cir. 2000) (citing, *inter alia*, § 3664(f)(4)(B) in approving a restitution order including "replacement value" of new furniture to replace used furniture destroyed in arson); *Black's Law Dictionary* 802 (8th

ed. 2004) (defining "in kind" as "In goods or services rather than money . . . .").

To be sure, § 3664's definition of "in-kind payment" for purposes of fashioning a defendant's future obligations does not directly control § 3663A(b)(1)(B)(ii), which values property a defendant has returned before or at sentencing. But the provision for "in-kind payments" makes clear that, *at* sentencing, a payment in a form other than the victim's original loss can constitute adequate return of the victim's property. It would be bizarre for § 3663A(b)(1)(B)(ii) to forbid offset credit for a similar payment merely because it was made *before* sentencing. Furthermore, the detailed definition of "in-kind *payment*" in § 3664(f) parallels the language in § 3663A(b)(1)(B), which requires that the defendant "*pay* an amount" calculated by using the offset provision. In sum, reading § 3663A and § 3664 together confirms that Congress intended for previous "replacement of property" payments to be offset from restitution awards.

Reading § 3663A(b)(1)(B)(ii) to allow offsets for "different-form" payments, as § 3664(f)(4) does, would further the MVRA's goal of granting district courts flexibility in crafting restitution orders. Such flexibility is important because many criminal defendants are impoverished, threatening victims' ability to recoup their losses in any form. If a criminal defendant has little cash but can provide replacement property or services, such forms of restitution will benefit victims. And an award of "replacement" property, unlike an award of services, does not require the victim's consent, see § 3664(f)(4)(B), (C), increasing the court's ability to tailor the restitution order to the defendant's specific financial circumstances. Given the importance of

replacement property payments to the § 3664 scheme, it is unlikely that Congress meant to exclude them from offset credit in § 3663A.

D. The MVRA Constrains Restitution To Damages That Criminal Activity "Directly And Proximately" Causes.

The MVRA defines a "victim" as "a person directly and proximately harmed as a result of the commission of" the crime. § 3663A(a)(2); see also *United States* v. *Squirrel*, 588 F.3d 207, 215 (4th Cir. 2009) (citing *Hughey*, 495 U.S. at 413); *United States* v. *Peterson*, 538 F.3d 1064, 1075 (9th Cir. 2008); cf. *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 8-9 (2010). The legislative history, in the form of the Senate Report, underscores this textual limitation—the MVRA only would apply where a victim suffers a loss "directly and proximately caused by the course of conduct under the count or counts for which the offender is convicted." S. Rep. No. 104-179, at 19 (1995). Put differently, the MVRA would require restitution only for losses "clearly causally linked to the offense." *Id.*

Congress had good reason to limit restitution to directly and proximately caused harms because "[i]njuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2637 (2011); *Pac. Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 691-92 (2012) (Scalia, J., concurring) (same). It is a "fundamental principle of criminal law" that criminal defendants are held responsible only for the injuries that they proximately caused. *United States* v. *Hayes*, 589 F.2d 811, 821 (5th Cir. 1979); see also *United States* v. *Monzel*, 641 F.3d. 528, 535 (D.C. Cir. 2011) ("It is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he

proximately caused."); Wayne R. LaFave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003).

The Seventh Circuit's interpretation defeats Congress' design in the circumstances here. That interpretation requires courts to reduce the restitution award only by the houses' values at resale, rather than at foreclosure. This means that the defendant must pay for any decline in the houses' values between the time the lenders foreclose and the time the lenders resell. *United States* v. *Smith*, 944 F.2d 618, 625 (9th Cir. 1991). But a defendant's false loan application is rarely the "direct," "unbroken" cause of those losses. *Hemi Grp.*, 559 U.S. at 8-9. Other "independent," "intervening" causes are. *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U.S. 469, 475 (1877); *Gordon*, 393 F.3d at 1055.

Here, for example, the houses' values dropped between foreclosure and resale because the real-estate market collapsed in the interim. J.A. 96-97.[10] Since that intervening collapse was unforeseeable, it was a "superseding" cause of the losses. See *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 838 (1996). Mortgage fraud was therefore not the proximate cause. *Id.* at 838-39; see *Smith*, 944 F.2d at 625.

Likewise, the lenders could have disposed of the property long before the resale dates and thus avoided the declines. See *Smith*, 944 F.2d at 625. They could have allowed a third party to purchase the property at the sheriff's sales. Alternatively, they could have purchased the properties at the sheriff's sales but then promptly resold the properties thereafter. The lenders themselves are therefore "directly" responsible for losses resulting from the

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[10] *See* Press Release, Standard & Poor's, *supra* note 5, at 1; Gjerstad & Smith, *supra* at note 5.

decline in house values between foreclosure and resale. *Id.*; *Hemi Grp.*, 559 U.S. at 8-9 (defining proximate cause).

The Seventh Circuit nonetheless insisted that mortgage-fraud defendants cause such losses. Without the defendant's fraud, the court explained, there would have been no loan, no house, and no need to worry about the decline in the value of the properties. See J.A. 155 ("Absent his fraudulent loan applications, the victim lenders would not have loaned the money in the first place."); J.A. 156 ("The declining market only became an issue because of Robers' fraud."). That the defendant's fraud is *a* cause of the loss, however, does not mean that the fraud is the *proximate* cause. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 266 (5th ed. 1984). Proximate cause "requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Hemi Grp.*, 559 U.S. at 9 (quoting *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)). There is no such connection in the circumstances here.

E. The Return Of Mortgage Collateral Should Trigger An Offset In Light Of Established Principles Of Mortgage Law.

The Seventh Circuit failed to undertake any analysis of well-established principles of state mortgage law in dismissing Mr. Robers' argument that the collateral served as replacement property for the lost loan proceeds. Those principles confirm that the return of mortgage collateral compensates a lender for its losses. See *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 543 (1994) (without a plain statutory directive requiring federal interference with "foreclosure law," this Court is loath to "presume [] a radical departure"); see generally *Pasquantino* v.

United States, 544 U.S. 349, 356 (2005) (relying on common law to confirm the Court's interpretation of a federal statute). Accordingly, the return of mortgage collateral is a clear instance—indeed, one of the strongest possible cases—where the offset provision should apply.

In Wisconsin and elsewhere, a judicial foreclosure action, such as the ones filed against Mr. Robers, is the predominant means of enforcing a mortgage after default, and is by definition the method by which the lender acquires title to the collateral as full or partial repayment of the loan. Nelson & Whitman, *supra* note 9, § 7.11, at 558-60; see also Wis. Stat. § 846.10(3). The "purpose of foreclosure" is "to give the foreclosure sale purchaser essentially the same title to the land as that possessed by the mortgagor when the foreclosed mortgage was executed." Nelson & Whitman, *supra*, § 7.12, at 560. A lender who has chosen to foreclose may not thereafter sue the mortgagee for the entire amount due; it must accept any amount that it receives from the foreclosure toward the repayment of the debt. *Id.* § 8.1, at 652-53.

If the lender receives a foreclosure judgment, the local sheriff presides over a sale of the property and the proceeds are "applied to the discharge of the debt adjudged to be due . . . ." Wis. Stat. § 846.10(3); see also, *e.g.*, U.C.C. § 9-608(a) (requiring that a secured party "shall apply . . . the cash proceeds of collection" of sale of security to "the satisfaction of obligations secured by the security interest . . . ."). Only after "applying the proceeds" of a sheriff's sale "to the amount due" may a lender obtain "judgment for any deficiency that may remain due . . . ." Wis. Stat. § 846.04(1). And this requirement applies "irrespective of whether the foreclosure purchaser is the mortgagee," which may purchase the property

itself by credit-bidding, "or a third party." Restatement (Third) of Prop.: Mortgages § 8.4 cmt. b (1997); see also *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2069 (2012) (describing credit-bidding as the lender's ability to "bid for the property using the debt it is owed to offset the purchase price . . . ."). A lender appraises property before extending a loan for this very reason—because it anticipates that it may eventually take title as repayment of the loan. In short, the lender has committed to accepting the real estate collateral as a replacement for the loan proceeds.

Mortgage law also dictates that when a lender forecloses and takes title to the property, foreclosure law values the property as of the date the lender takes title, not as of the date the property is sold. After foreclosure, mortgage law allows a lender to pursue the borrower for the remaining debt.[11] In Wisconsin, as in all states, this deficiency judgment is calculated by subtracting the value of the home at the time of foreclosure, and not the value of the home at the time the property is eventually sold by the lender. See, *e.g.*, *Drach* v. *Hornig*, 267 N.W. 291, 292 (Wis. 1936) (holding that trial court, "having confirmed" a sheriff's sale, "could only render judgment [against the debtor] for the deficiency appearing in the report of sale"); Wis. Stat. § 846.04(1); U.C.C. § 9-608(a).[12]

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[11] As noted above, however, both MGIC and American Portfolio waived their rights to pursue deficiency judgments against Mr. Robers.

[12] Note that this distinction only arises if the lender is the high bidder at the sheriff's sale; if a third party is the high bidder, the lender gets its cash immediately, without ever taking title to the property. While states differ on whether the collateral's value is determined by the winning bid at the sheriff's sale or an independent analysis of fair market value, all

The recognition is that the collateral is the equivalent of the loan proceeds. See also *infra* Section I.F. That uniform rule of mortgage law supports the implication of the text and structure of § 3663A(b)(1): that a lender's lost property is "returned" when the lender or its successor takes title to foreclosed real estate.

A mortgage granted to a lender is a security interest in a particular piece of real estate; in a purchase-money mortgage, such as those in this case, the borrower explicitly agrees to use the proceeds of the underlying loan to buy that real estate. Nelson & Whitman, *supra*, § 1.1, at 1. The sole purpose of that security interest is to protect the lender: since there is a significant risk that *any* homebuyer, even an honest one, will default on the loan, the lender values the right to dispose of the real property in that scenario as a means of protecting its loan. This feature of secured transactions makes a lender more willing to lend in the first place: unlike in an unsecured transaction, the lender has a built-in mechanism to recoup its money. See, *e.g.*, *Harvest Sav. Bank* v. *ROI Invs.*, 563 N.W.2d 579, 584 (Wis. Ct. App. 1997) ("Payment of the mortgage is only one way to extinguish a mortgage . . . [A] mortgage is also extinguished upon confirmation of the foreclosure sale."). Taking title to the property is thus a common means of getting a "return" of the loan proceeds.

The Seventh Circuit's belief that lenders care only about "the cash recouped following the disposition of the collateral," J.A. 154-55, therefore turns the con-

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states base a deficiency judgment on the collateral's value at the time of the sheriff's sale, and not at the time the property is eventually sold by the lender. See George E. Osborne, *Handbook on the Law of Mortgages* § 333, at 698-99 (2d ed. 1970).

cept of collateral on its head. In stating that lenders do "not want the houses" and "do not, in any way, benefit from possessing title" until the real estate is sold, J.A. 153, the court misunderstood the nature of the mortgage market. As discussed above, both lenders in this case, like many other foreclosing lenders, elected to waive their rights to a deficiency judgment. This meant that the lenders accepted the collateral as *full satisfaction* of their claims: they could not receive, and did not expect to receive, any further recovery against Mr. Robers beyond the foreclosed houses. Wis. Stat. § 846.101(2). This fact negates the Seventh Circuit's suggestion that victim-lenders do not want the collateral that secures a mortgage loan. As this case demonstrates, lenders often want nothing but the collateral—and contractually bind themselves to seek only the collateral. This Court should presume that Congress did not mean to establish a regime at complete odds with the common law and state law practices of awarding compensatory damages in such situations.

F. A Defendant Like Mr. Robers Actually Returns The Original Lost Property By Transferring The Houses.

Even if, as the Seventh Circuit held, § 3663A(b)(1)(B)(ii) does require a defendant to return the identical property that the victim originally lost, the statute still requires reversal.

At foreclosure, a defendant like Mr. Robers returns the value of the loan money that the victims originally lost. Since the defendant invested the money in the houses, the houses hold the money's value. See John B. Taylor, *Economics* 822 (1995) ("Store of Value"); *United States* v. *Shepard*, 269 F.3d 884, 887-88 (7th Cir. 2001). When the lenders thereafter foreclose and take control of those houses, they

recoup that value. *Shepard*, 269 F.3d at 887-88. To borrow an analogy Judge Easterbrook used in a similar scenario, the transfer is "no different in principle from taking the money from one of [the lenders'] bank accounts and [later] depositing it in another" account during foreclosure. *Id.* at 887-88. Under § 3663A(b)(1)(B)(ii), therefore, a mortgage-fraud defendant returns "part" of the lenders' money—the money's value—when the lenders foreclose and take title to the houses. § 3663A(b)(1)(B)(ii) (requiring an offset once a defendant returns "any part" of the property); *United States* v. *Holley*, 23 F.3d 902, 915 (5th Cir. 1994); *United States* v. *Boccagna*, 450 F.3d 107, 112 n.2 (2d Cir. 2006); see also *Smith*, 944 F.2d at 625-26.

The Seventh Circuit reasoned that, unless the defendant returns property in the same form, the victim might lose the original form's advantages, such as liquidity. But the statute says nothing about the property's form. Rather, the statute directs courts to grant an offset once a defendant returns "any part" of the lost property. § 3663A(b)(1)(B)(ii); cf. *Worth Bros. Co.*, 251 U.S. at 509 (reading the statutory phrase "any part" broadly). That the lost property's form has advantages over the returned property's form might be relevant in calculating the latter's *value* under § 3663A(b)(1)(B), but not in deciding whether a defendant has returned "any part" of the lost property at all. In any event, the Seventh Circuit overstates those advantages in cases like this one. The lost property's form, money, has no "intrinsic" value. 2 Martin Shubik, *Fiat Money, in The New Palgrave: A Dictionary of Economics* 316 (1987). It exists only to store value temporarily and then transfer that value from the lender's bank account to the house. See *id.*; Taylor, *supra*, at 822.

Although the returned property's form, a house, might not be perfectly liquid, neither is home-loan money: Borrowers use purchase-money loans only for their agreed purpose of buying particular houses. See Nelson & Whitman, *supra*, § 1.1, at 1 ("A purchase money mortgage arises where the mortgagor's acquisition of the mortgaged real estate is financed by the mortgagee-lender.").

Further, as noted above, a lender recoups cash through foreclosure. When the lender purchases (or "credit bids") the foreclosed property at the sheriff's sale, the transaction is the "same as if the [lender] has paid cash and then immediately reclaimed that cash in payment of the [mortgage] debt." *In re HNRC Dissolution Co.*, 340 B.R. at 824-25 (interpreting 11 U.S.C. § 363(k)); see also *In re Spillman Dev. Grp., Ltd*, 710 F.3d 299, 307-08 (5th Cir. 2013); *United States* v. *Petty Motor Co.*, 767 F.2d 712, 715-16 (10th Cir. 1985). Thus, the property originally lost is returned during the sheriff's sale, rather than when the victims later resell the property.

G. The Statute Should Be Read To Avoid The Anomalous Results Created By The Seventh Circuit's Interpretation.

Beyond its divergence from basic tenets of mortgage law, the Seventh Circuit's interpretation leads to anomalous results that Congress could not have intended.

Victims take title to property in the course of nearly every fraud scheme, and that property is rarely in the same form as their loss (usually money). Consider an auto dealer who rolls back odometers so that a car with Blue Book value of, say, $16,000 appears to be worth $20,000. A victim who buys the altered car pays $20,000, but because he gains the use of the car

the true loss caused by the dealer's fraud is easily computed: only $4,000. Yet under the Seventh Circuit's interpretation, the value of the car for restitution purposes would be its price when resold by the victim, and the defendant would be responsible for later fluctuations in its value (which could be much greater than $4,000). Among other anomalies, the Seventh Circuit's reading would create inconsistencies between defendants: the restitution amounts for identical crimes would vary based on later market movements outside of the defendants' control. It is hard to see why Congress would have chosen this scheme over the certainty provided by Mr. Robers' preferred interpretation.

The Seventh Circuit's reading would also cause anomalies in non-fraud cases. For example, in the case of arson the defendant cannot "return" a destroyed building in its original form,[13] and so the Seventh Circuit's reading would require a sentencing court to ignore a cash payment to a victim by a remorse-stricken arsonist. Counting the defendant's court-ordered payment, the victim would receive more than the amount of her loss—perhaps twice as much. That would contradict the well-understood purpose of criminal restitution "to compensate victims only for losses caused by the conduct underlying the offense of conviction." *Hughey*, 495 U.S. at 416. Congress could not have intended such double recoveries, and neither the statutory text nor the legislative history contain any indication that it did. Even if the plain text of the statute did not

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[13] Indeed, on the Seventh Circuit's reading, it is hard to see how clause (B)(ii) could have any application at all when a defendant has caused "damage to" or "destruction of" property, § 3663A(b)(1), in which case return of the identical property by the defendant would be impossible.

compel Mr. Robers' reading, the Court would need more evidence that Congress meant to create such a counterintuitive restitution scheme. See *Pub. Citizen* v. *Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result,' . . . we must search for other evidence of congressional intent to lend the term its proper scope." (internal citation omitted)).

H. The Seventh Circuit's Interpretation Undermines The Statute's Purpose.

The MVRA's purpose is to make victims whole without granting them windfalls. *United States* v. *Louper-Morris*, 672 F.3d 539, 566 (8th Cir. 2012); *United States* v. *Parker*, 553 F.3d 1309, 1323 (10th Cir. 2009). As this Court has noted, the purpose of restitution statutes is to restore the victim "to a position he occupied before" the crime but not to punish the defendant. *Hughey*, 495 U.S. at 416; see also *Parker*, 553 F.3d at 1323. The design also appears in the statutory text: On the one hand, § 3663A and § 3664(f)(1)(A) require compensation for the "full amount" of the victims' losses proximately caused by the defendant's crime. On the other hand, § 3663A(b)(1)(B)(ii) directs courts to reduce victims' restitution awards by the value of property the defendant returns (as of the date of its return). Likewise, § 3664(j)(2) requires courts to reduce the restitution award by the "amount later recovered as compensatory damages for the same loss" in civil proceedings. See S. Rep. 104-179, at 21 (1995) (explaining that the provision's purpose is to ensure that victims would not be "compensated twice for the same loss"). The Court should therefore evaluate the Seventh Circuit's interpretation in light of that design. See generally *Kasten*, 131 S. Ct. at 1330-31.

The Seventh Circuit's interpretation creates the real risk of both undercompensating victims and granting them windfalls. Under that interpretation, a court may reduce the restitution award only once the victims resell the houses. In some cases, however, the victims will not have done so before sentencing; indeed, they might wait years. *Holley*, 23 F.3d at 914 (almost six years); *United States* v. *Hutchison*, 22 F.3d 846, 856 (9th Cir. 1993) (two years), *abrogated by United States* v. *Wells*, 519 U.S. 482 (1997). This creates a dilemma for the sentencing court because it must choose between two undesirable options. First, the court may refuse to order restitution at all, since calculating the correct amount of restitution will unduly "prolong the sentencing process." § 3663A(c)(3)(B). That leaves the victims uncompensated. Second, the court may order restitution for the *full* outstanding loan amount. See J.A. 157 n.7. But that grants the victims a potential windfall, because they may later resell the houses for a profit.

The Seventh Circuit disputed that its reading might grant windfalls in cases where the court orders restitution before the victims resell the houses. The court of appeals asserted—without citation—that courts in such scenarios may order restitution for the "total loss to the victims" and, "once the real estate is sold," later modify the restitution award. See J.A. 157 n.7. But neither § 3663A nor § 3664 allow a later modification for that purpose. Catherine M. Goodwin, *Federal Criminal Restitution* § 13:2 (2013). That omission was intentional: Congress wanted courts to order restitution expeditiously. § 3663A(c)(3)(B). And Congress specifically identified the sole circumstance in which a court could later adjust an award: when a victim requests an

adjustment for a newly discovered loss and shows good cause for the delay in presenting the loss to the court. § 3664(d)(5); see also S. Rep. No. 104-179, at 20 (1995). Thus, the Seventh Circuit's interpretation will permit some victims to collect full restitution and later resell the houses for a windfall. For this reason and the others above, the Court should reject that interpretation.

I. Even Were The Restitution Statutes Ambiguous, The Rule Of Lenity Would Require That Substitute Property Triggers The Offset Provision.

If this Court does not agree that the text and structure of § 3663A plainly require offsets to restitution for the return of collateral, it would need to apply the rule of lenity. The rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose," *Albernaz* v. *United States*, 450 U.S. 333, 342 (1981), including restitution orders. *Hughey*, 495 U.S. at 422.

"[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a 'grievous ambiguity or uncertainty in the statute . . . .'" *Barber* v. *Thomas*, 130 S. Ct. 2499, 2508 (2010); see also *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) (applying rule of lenity because "text, structure, and history fail to establish that the Government's position is unambiguously correct . . . ."). But the Court must conclude at least as much. The statute's broad terms do not "unambiguously" support the Seventh Circuit's reading. The word "returned" may refer either to repaying a debt in any form or to giving back the same property taken. Congress' use of passive voice fails to clarify how or in what form "the property"

must be "returned." And the statute's repeated use of the definite article "the" in the phrase "the property" even in circumstances in which "return of the property" is impossible creates further uncertainty about whether the phrase always takes the same meaning. If the statute's structure, the influence of state mortgage law, and the other "considerable interpretive tools" available, *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994), fail to clarify these terms, the statute is grievously ambiguous and this Court should apply the rule of lenity.

That rule requires that § 3663A be interpreted to grant offset credit for mortgage collateral returned to a victim. Nearly all defendants who make pre-sentencing in-kind returns of collateral or other property to their victims would receive a lower offset value under the Seventh Circuit's reading. And even if a victim did convert the returned property into cash, which the Seventh Circuit would require for the property to have any offset value, that value would depend on market conditions and the victim's investment decisions, variables wholly beyond the control of a defendant like Mr. Robers. Such uncertain and unforeseeable punishments are precisely what the rule of lenity is meant to avoid.

The rule of lenity would thus compel the rejection of the Seventh Circuit's position—but this Court need not resort to it. The unambiguous text of § 3663A and its companion statute, § 3664, demonstrates that a defendant is entitled to offset credit for returning mortgage collateral. Such a reading comports with settled mortgage law and with the expectations of mortgage lenders, who understand that they may take title to the mortgage collateral (as the lenders in this case actively sought to do); and, unlike the Seventh Circuit's reading, it leads to logical restitution

amounts for fraud and other crimes. The Court should rule that § 3663A grants offset credit for the return of mortgage collateral, as of the date the collateral is returned.

CONCLUSION

Mr. Robers respectfully requests that the Court vacate the judgment of the court of appeals and remand for a redetermination of the restitution amount.

Respectfully submitted,

JEFFREY T. GREEN
JACQUELINE G. COOPER
DAVID R. KUNEY
JOSH C. HESS
JEFFREY S. BEELAERT
ADAM N. HALLOWELL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SUPREME COURT
PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611

CHRISTOPHER DONOVAN*
PRUHS & DONOVAN, S.C.
757 N. Broadway
Milwaukee, WI 53202
Donovanc34@hotmail.com
(414) 221-1950

JONATHAN E. HAWLEY
Chief Federal Public
Defender
DANIEL T. HANSMEIER
Assistant Federal
Public Defender
FEDERAL PUBLIC
DEFENDER'S OFFICE
CENTRAL DISTRICT OF
ILLINOIS
600 E. Adams Street,
2d Floor
Springfield, IL 62701

Counsel for Petitioner

December 13, 2013

* Counsel of Record

APPENDIX

APPENDIX

18 U.S.C. § 3663A - Mandatory restitution to victims of certain crimes

(a)

(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an

amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)

(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

18 U.S.C. § 3664 - Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)

(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documenta-

tion or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)

(1)

(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)

(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds

from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)

(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circum-

stances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)

(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or

require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)

(1)

(A)

(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

RESPONDENT'S BRIEF

No. 12-9012

In the Supreme Court of the United States

BENJAMIN ROBERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

When the victim of a crime is entitled to restitution for the loss of property and return of the lost property is "impossible, impracticable, or inadequate," 18 U.S.C. 3663A(b)(1)(B) provides that a defendant shall pay "an amount equal to—(i) the greater of * * * (I) the value of the property on the date of the damage, loss, or destruction; or (II) the value of the property on the date of sentencing, less (ii) the value (as of the date the property is returned) of any part of the property that is returned." The question presented is:

Whether the district court correctly calculated a restitution award for victims who lost money because of the defendant's loan fraud when the court reduced the victims' losses by the amount of money they recouped from the sale of the collateral securing the loans.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 143-181) is reported at 698 F.3d 937. The order of the district court (J.A. 132-142) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2012. A petition for rehearing was denied on November 28, 2012 (J.A. 182). The petition for a writ of certiorari was filed on February 26, 2013, and was granted on October 21, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-12a.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of Wisconsin to one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 371. J.A. 144. He was sentenced to three years of probation and ordered to pay $218,952.18 in restitution to the victims of his scheme. J.A. 132-142. The court of appeals affirmed the restitution award except to the extent it included attorney's fees and certain expenses. J.A. 144-181.

1. The Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, requires a sentencing court to order restitution to victims when sentencing defendants for specified crimes, including "any offense committed by fraud or deceit" and other offenses against property. See 18 U.S.C. 3663A(c)(1)(A)(ii). The statute provides that, if the offense of conviction results in "damage to or loss or destruction of property of a victim of the offense," then "[t]he order of restitution shall require that such defendant * * * return the property to the owner of the property." 18 U.S.C. 3663A(b)(1)(A). The statute further provides that, when "return of the property * * * is impossible, impracticable, or inadequate," the defendant must be ordered to compensate the victim in other ways. 18 U.S.C. 3663A(b)(1)(B). In particular, a sentencing court must order a defendant to "pay an amount equal to":

> (i) the greater of—
>
> (I) the value of the property on the date of the damage, loss, or destruction; or
>
> (II) the value of the property on the date of sentencing, less

> (ii) the value (as of the date the property is returned) of any part of the property that is returned.

Ibid. This case concerns Section 3663A(b)(1)(B)(ii), which requires that the amount of restitution required be reduced by the "offset" value of any portion of the lost or damaged property that is returned to the victim.

2. Petitioner pleaded guilty to participating in a mortgage-fraud scheme that involved approximately 15 houses in a small geographic area in Walworth County, Wisconsin. J.A. 80-81, 147; see J.A. 13-16 (plea agreement). In furtherance of the scheme, petitioner's co-conspirators recruited straw buyers (including petitioner) to submit fraudulent mortgage-loan applications that materially misrepresented the straw buyers' incomes, qualifications, and intentions to live in the houses and repay the mortgages. J.A. 147. The fraudulent loan applications caused loan funds to be wired from lending institutions to settlement companies that closed the loans. *Ibid.* The sellers of the properties (at least some of who were in on the scheme) paid monies characterized as "consulting fees" to the two organizers who recruited petitioner. J.A. 14-15.

In exchange for payments from his co-conspirators, petitioner submitted fraudulent loan applications for two properties—900 Inlet Shores and 911 Grant Street. J.A. 81, 147-148. Using his own name, petitioner signed and submitted loan applications that misrepresented his income and assets as well as his intentions to repay the loans and to occupy the houses. J.A. 15, 148. Petitioner also signed the mortgage documents that resulted in the sale of the properties and the funding of the mortgages. *Ibid.* Based on petitioner's

misrepresentations, M.I.T. Lending/Challenge Financial Services approved a $330,000 mortgage note for the Inlet Shores property, and Paragon Lending approved a $141,000 mortgage note for the Grant Street property. J.A. 38, 60, 102, 148-149. Petitioner made no payments on either loan and the loans went into default. J.A. 16, 148. The lenders (or their successors in interest) foreclosed on the loans and ultimately resold the houses that had served as collateral. J.A. 38, 148-149.

3. Petitioner pleaded guilty to an information charging him with conspiracy to commit wire fraud, in violation of 18 U.S.C. 371. J.A. 144. In his plea agreement, he admitted that restitution is mandatory "regardless of [his] financial resources" and "agree[d] to pay restitution as ordered by the court." J.A. 21.

Before sentencing, the probation office prepared a Presentence Investigation Report (PSR) that recommended that petitioner be required to pay $52,592 to Mortgage Guaranty Insurance Company (MGIC) (the ultimate victim of the fraud as to the Grant Street property) and $136,000 to American Portfolio (the ultimate victim of the fraud as to the Inlet Shores property). See J.A. 38-39.[1] Petitioner objected to the PSR's restitution recommendation, arguing that he should pay only $4800 because of his minimal role in the fraudulent scheme and his inability to pay the full amount recommended in the PSR. J.A. 29-32. Petitioner argued in the alternative that "the difference between the original loan amount and what the [fraud-

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[1] The parties have agreed that the recommended amounts stated in the PSR were based on factual and calculation errors and should have been $52,952.18 and $166,000 instead. Pet. C.A. Br. 9 n.4; Gov't C.A. Br. 5 n.3; see J.A. 39, 56.

ulently obtained] propert[ies] sold for at a sheriff's sale is not caused by [petitioner's] crime" but was instead caused by factors such as "the housing market" or "the victim[s'] rush to cut their losses." J.A. 34-35.

At petitioner's sentencing hearing, the government presented evidence about the amount of money lost by the victims as a result of petitioner's fraud. See J.A. 53-131. With respect to the Grant Street loan, a representative of MGIC testified that at the time of default, the mortgage was owned by Fannie Mae (which had acquired it from the original lender) and insured against default by MGIC. J.A. 58-62, 148-149. After petitioner defaulted on the note and Fannie Mae acquired title to the Grant Street property, Fannie Mae submitted a claim for $159,214.91 to MGIC. J.A. 61-65, 149. Under the terms of its insurance agreement, MGIC had the option of either paying a percentage of Fannie Mae's claim or paying the full amount of the claim, acquiring the Grant Street property collateral, and then selling the collateral. J.A. 62, 65, 149. Using a computer model that predicts the best outcome for the company, MGIC chose to pay the full amount. J.A. 77, 149. After acquiring title to the Grant Street collateral, MGIC maintained the collateral and received periodic updates from its broker about the potential sales price of the house. J.A. 63-66, 70-71. MGIC ultimately sold the Grant Street collateral for $118,000. J.A. 66. Deducting expenses from the sale, MGIC's net gain from the sale was $107,908.93, which reduced its total loss resulting from petitioner's fraud to $52,952.18. J.A. 66-67, 149, 176.

With respect to the Inlet Shores loan, an agent from the Federal Bureau of Investigation testified that the original mortgage note was ultimately purchased by

American Portfolio for $330,000 (the amount of the original loan). J.A. 79, 86-89, 92, 149. The mortgage servicing company (Merrill Lynch Mortgage Lending) took title to the collateral when no one bid on the house during the sheriff's foreclosure sale. J.A. 89, 95-96. The house later sold for $164,000, resulting in a net loss to American Portfolio of $166,000. J.A. 87, 90, 149.

At the hearing, petitioner renewed his argument that the restitution amount should be reduced because he played only a minor role in the offense and could not afford to pay more than a few thousand dollars. J.A. 111-113. He also argued generally that the victims' losses were caused by "the real estate market" rather than petitioner's fraud. J.A. 113-114. The district court rejected petitioner's arguments, holding petitioner jointly and severally liable for the full amount of the victims' losses. J.A. 117-121. The court explained that, "[w]ithout [petitioner's] participation, these properties wouldn't have been sold to these victims in the fashion that they were." J.A. 117. The district court thus ordered petitioner to pay $218,952.18 in restitution—$52,952.18 to MGIC and $166,000 to American Portfolio—pursuant to the MVRA. J.A. 117, 121, 138-139; see J.A. 129-130 (joint and several liability).

4. The court of appeals affirmed the district court's calculation of the restitution (with the exception of its inclusion of attorney's fees and certain expenses, which are not at issue here). J.A. 144-181. For the first time, petitioner argued on appeal that Section 3663A(b)(1)(B)(ii) required the district court to offset the victims' losses by the value of the collateral at the time the victims took title to the houses

rather than by the amount of money the victims ultimately recouped when they sold the houses. Pet. C.A. Br. 21-36; see J.A. 150. The court of appeals rejected that argument, holding that "in calculating a restitution award where, as in this case, cash is the property taken, the restitution amount is reduced by the eventual cash proceeds recouped once any collateral securing the debt is sold." J.A. 152.

The court of appeals relied on "the plain language of the MVRA" and its use of the phrase "the property" in particular. J.A. 151-154. The court noted that the offset provision in Section 3663A(b)(1)(B)(ii) applies when there is "damage to or loss or destruction of property of a victim of the offense." J.A. 152-153 (quoting 18 U.S.C. 3663A(b)(1)). The references thereafter to "the property," the court of appeals reasoned, "must" refer to "the property originally taken from the victim." J.A. 152. In this case, "the property taken from the victims was cash," not the real estate that served as collateral for the loan of cash. J.A. 153. The court thus explained that "the property" taken through fraud is "returned" to the victim only when the victims get cash back. *Ibid.* In statutory terms, the court of appeals held that the offset provision's direction that the restitution award be reduced by "the value (as of the date *the property* is returned) of any part of *the property* that is returned" requires that the restitution award be reduced by the amount of money the victims recouped upon selling the collateral rather than by some measure of the value of the collateral when the victims took title to the houses. J.A. 152-153 (quoting 18 U.S.C. 3663A(b)(1)(B)(ii)). Because money is liquid and real estate is not, the court explained, "[t]he two cannot be equated." J.A. 153.

The court of appeals further explained that its reading of the statutory text made sense in light of the structure and purpose of the MVRA. J.A. 151-157. As the court noted, under its interpretation of the MVRA, "the phrase 'the property' [has] a consistent meaning throughout the statute: It always means 'the property stolen.'" J.A. 153. In contrast, the court noted, petitioner would "give the phrase 'the property' a different meaning within the same statutory section." *Ibid.* The court also explained that its view is "consistent with" the "MVRA's overriding purpose" of "compensat[ing] victims for their losses." J.A. 154 (citation omitted). In contrast, "victims would not be made whole again" under petitioner's view "because the eventual sales proceeds could be, as they were in this case, woefully inadequate to fully compensate the victims for their loss and to put them in the position they would have been absent the fraud." J.A. 155.

The court of appeals also rejected petitioner's argument that the district court's ruling "makes him the insurer of real estate values and improperly holds him responsible for declines in the real estate market." J.A. 155. As the court of appeals explained, petitioner's fraud "actually caused the losses at issue here" because, "[a]bsent his fraudulent loan applications, the victim lenders would not have loaned the money in the first place," the mortgage notes "would not have been extended, not paid, and then defaulted upon," and "the banks would not have had to foreclose on and then resell the real estate in a declining market at a greatly reduced value." *Ibid.* The court rejected petitioner's contention that "[t]he decline in the real estate market * * * mitigate[d] his fraud" because,

"[a]bsent [petitioner's] fraud, the decline in the real estate market would have been irrelevant." *Ibid.*

SUMMARY OF ARGUMENT

Petitioner seeks to reduce his restitution obligation by claiming an offset for the "return" of "the property" he fraudulently acquired. But none of the property petitioner acquired through fraud was returned to the victims when they foreclosed on the collateral securing the fraudulently obtained loans. Petitioner obtained *money* through his fraud and the victims did not receive *money* until the collateral was sold.

A. When a covered crime results in a victim's loss of property, the MVRA requires the defendant to return the lost property to his victim. If return of the property in full is not possible, the MVRA requires the defendant to pay the victim for the value of the lost property and allows an offset for the value of "any part of the property" that is returned to the victim. 18 U.S.C. 3663A(b)(1)(B). Because the victims of petitioner's mortgage-fraud scheme lost money as a result of petitioner's offense, no "part of the property" that was lost was returned to them until they received money from selling the collateral. Section 3663A(b)(1) addresses the treatment of property lost by a victim and every reference to "the property"—including Section 3663A(b)(1)(B)(ii)'s reference to "any part of the property that is returned"—is a reference to the property that was lost, not to any substitute property.

Petitioner's contrary reading of the statutory text is incorrect. Read in context, the reference in Section 3663A(b)(1) to some or all of the property that is "returned" is plainly a reference to some or all of the property that was lost as a result of the criminal conduct and that is later returned to the victims. That

meaning is consistent with Section 3663A(b)(1)(B)'s application to situations in which the return of the lost property is impossible, impracticable, or inadequate. Subparagraph (i) addresses situations in which none of the lost property can be returned and Subparagraph (ii) addresses situations in which either some (but not all) of the lost property can be returned or return of the original property is inadequate to compensate the victim because, *e.g.*, it has been damaged. Throughout both subparagraphs, "the property" referred to is the property that was lost.

B. The government's interpretation of Section 3663A(b)(1)(B) is consistent with the structure of the MVRA more generally. Section 3663A governs the substantive calculation of a defendant's restitution obligation. Section 3664 governs the procedures and means of enforcing that obligation. Different considerations are appropriate under each statute. Though a court may order a defendant to satisfy his restitution obligation with substitute property under Section 3664, it may not grant an offset for substitute property when calculating the restitution amount that is due under Section 3663A.

C. Petitioner's interpretation of Section 3663A would also undermine the MVRA's purpose of efficiently assuring that crime victims receive full restitution. A lender that is fraudulently deprived of money is not restored to its pre-fraud state until it gets that money back; the collateral is not the same until it is sold. Nor does this view of Section 3663A(b)(1)(B)(ii) lead to anomalous results. A victim of mortgage fraud has every incentive to maximize the money it receives from foreclosed real estate and any increase in value the collateral gains between foreclosure and resale

will inure to the benefit of both the victim and the defendant. Under petitioner's view, in contrast, victims of mortgage fraud must bear the full burden of any loss in value while defendants will enjoy the benefit of any gain.

D. Petitioner further errs in arguing that the district court should have valued the offset as of the time the lenders took title to the houses because petitioner's criminal scheme did not directly and proximately cause the loss in value of the houses from that moment to the moment of their resale. The chain of causation from petitioner's fraud to the victims' ultimate loss is clear and direct. Petitioner is incorrect that his victims' acquisition of the collateral through foreclosure was an intervening event that broke the chain of causation. If not for petitioner's fraud, the victims would not have loaned him the money, would not have taken title to the houses when he defaulted on the loans, and would not have had to sell the houses in a declining market. Petitioner's criminal conduct was a direct and proximate cause both of the victims' losses and of the relevance of the declining market to the offset calculation.

E. Petitioner errs in relying on principles of mortgage and foreclosure law. The MVRA's broadly applicable provisions—which apply notwithstanding any other provision of law—should not be distorted to accommodate mortgage principles. Petitioner is, moreover, incorrect that a lender who forecloses has agreed that the collateral is equal in value to the outstanding loan proceeds. Foreclosure is tantamount to a settlement of some or all of the lender's civil claim. The MVRA specifically takes account of the possibility that crime victims will receive some compensation for

their losses and forbids a sentencing court from taking such compensation into account in determining the amount of restitution due. Foreclosure proceedings should receive the same treatment.

F. Finally, petitioner's reliance on the rule of lenity is unavailing because Section 3663A(b)(1)(B)(ii)'s text is not ambiguous at all, let alone grievously so.

ARGUMENT

WHEN A DEFENDANT FRAUDULENTLY OBTAINS LOAN FUNDS TO PURCHASE A HOUSE AND THE VICTIM LENDER SUBSEQUENTLY OBTAINS THE HOUSE THROUGH FORECLOSURE, A DISTRICT COURT SHOULD OFFSET THE AMOUNT OF RESTITUTION DUE BY THE AMOUNT OF MONEY THE LENDER ULTIMATELY OBTAINS BY RESELLING THE HOUSE

Petitioner was convicted of conspiring to fraudulently obtain money from lenders so that he could purchase two houses. The loss his victim lenders suffered was a loss of money, not a loss of the houses, which the lenders did not own before petitioner's fraud and had no intention of ever buying. The MVRA requires a district court to order a defendant who has committed a fraud crime to pay restitution to his victims in "the full amount of each victim's losses." 18 U.S.C. 3663A(a)(1), 3664(f)(1)(A). When petitioner's victims took title to petitioner's houses through foreclosure proceedings, petitioner did not return any part of the property his victims lost as a result of his fraud—*i.e.*, money. The victims recouped their lost property when they later sold the houses petitioner purchased with their money. The district court correctly determined the amount of offset to be applied against petitioner's restitution amount as the amount of money the victims recouped when they sold the houses.

A. Under The Plain Text Of The MVRA, The Proper Measure Of The Offset Amount Is The Amount Of Money The Victims Received When They Sold Petitioner's Houses

Congress enacted the MVRA to make restitution mandatory for all victims of specified crimes, without regard to the defendant's ability to pay. See S. Rep. No. 179, 104th Cong., 1st Sess. 18-21 (1995) (1995 Senate Report). Section 3663A specifies the crimes for which restitution is mandatory and dictates the manner in which a sentencing court should determine the amount of a victim's loss. 18 U.S.C. 3663A. Section 3664 generally specifies the procedures available for issuing and enforcing an order of restitution. 18 U.S.C. 3664.

1. The MVRA provides that, "when sentencing a defendant convicted of" specified offenses (including fraud), a district court "shall order * * * that the defendant make restitution to the victim of the offense" in "the full amount of each victim's losses." 18 U.S.C. 3663A(a)(1) and (c)(1)(A)(ii), 3664(f)(1)(A). When a victim suffers a "loss * * * of property" as a result of the offense of conviction, the MVRA requires the defendant to "return the property to the owner of the property." 18 U.S.C. 3663A(b)(1)(A). In this case, institutional lenders (and their successors in interest) suffered a loss of money as a result of petitioner's fraud. In the normal course, the MVRA would thus require petitioner to "return the property"—*i.e.*, the money—to his victims. 18 U.S.C. 3663A(b)(1)(A). Because petitioner does not have the amount of money that he stole from his victims, "return of the property" he obtained through fraud "is impossible [or] impracticable." 18 U.S.C. 3663A(b)(1)(B). In such a situation, the MVRA requires that a defendant pay restitu-

tion in an amount "equal to * * * the greater of * * * the value of the property on the date of the * * * loss" or "the value of the property on the date of sentencing." 18 U.S.C. 3663A(b)(1)(B)(i)(I) and (II). But when "any part of the property" is returned to the victim, the amount of restitution the defendant owes must be reduced (or offset) by "the value (as of the date the property is returned)" of the portion of the property that is returned. 18 U.S.C. 3663A(b)(1)(B)(ii). The question in this case turns on the meaning of the phrase "any part of the property that is returned" in Section 3663A(b)(1)(B)(ii).

In determining the meaning of a statutory provision, courts must "look first to the language of the statute itself." *Hughey* v. *United States*, 495 U.S. 411, 415 (1990); see *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009). The plain text of Section 3663A unambiguously dictates that, when a defendant gives his victim (or allows his victim to acquire) substitute property that is different from the property the victim lost as a result of the defendant's crime, he has not "returned" "any part of the property" that was lost for purposes of the MVRA. 18 U.S.C. 3663A(b)(1)(B)(ii). Section 3663A(b)(1) governs situations in which a defendant's crime caused "damage to or loss or destruction of property." Every reference in that subsection to "the property" therefore refers to the property the victim lost. See *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'") (quoting *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)). A defendant cannot satisfy the statute's command that,

when a victim has lost property, a defendant must "return the property to the owner of the property" by giving the victim some other property. 18 U.S.C. 3663A(b)(1)(A) and (B). If a defendant fraudulently obtains a victim's gold necklace, for example, the defendant does not "return the property to the owner of the property" (for purposes of the MVRA or for purposes of normal English parlance) by keeping the necklace and instead giving the victim a gold bracelet or a valuable stamp collection. If the defendant has the property he stole, he must return it to the victim—because "the property" in Section 3663A(b)(1)(A) refers to the property that was lost.

The same is true of Section 3663A's treatment of lost property that cannot be returned to the victim. When lost property cannot be returned at all, a defendant must pay the victim the greater of the value of the property when taken or the value of the property at sentencing. 18 U.S.C. 3663A(b)(1)(B)(i). Sometimes, property that is lost can be returned in part. For example, if a defendant fraudulently obtained a gold necklace and a gold bracelet and then gave the necklace to a third party in exchange for a stamp collection, it would be impossible or impracticable for the defendant to return the necklace to the victim. But he could return the bracelet—and if he did so, he would be entitled to an offset for "the value (as of the date the property is returned) of [the] part of the property that is returned" (*i.e.*, the bracelet). 18 U.S.C. 3663A(b)(1)(B)(ii). He would not be entitled to an offset equal to his victim's entire loss, however, if he returned the bracelet and gave the victim the stamp collection he obtained in exchange for the stolen necklace. Because the stamp collection would not be "any

part of the property" stolen, it would not qualify for an offset under Section 3663A(b)(1)(B)(ii).

2. In this case, petitioner fraudulently obtained money from his victims (or their predecessors in interest). Thus, for purposes of the MVRA (and common sense), the "property" the victims lost was money, and petitioner is entitled to an offset only for the amount of money that was returned to the victims. Of course, petitioner never directly returned any portion of the money he fraudulently obtained to the victims or their successors in interest. Instead, the victims obtained title to the houses that petitioner purchased with their money. That collateral was used to secure the loans petitioner fraudulently obtained; it was not the property that was lost as a result of the fraudulent scheme. If it had been, petitioner's restitution debt would have been fully satisfied when the lenders took title to the houses.

When each victim took title to the houses petitioner had purchased, no "part of the property" that was lost was "returned." 18 U.S.C. 3663A(b)(1)(B)(ii). At that moment, each victim received something else altogether—an illiquid asset that may be converted into liquid funds only after the investment of time and resources. Although the houses at issue in this case undoubtedly had monetary value when the victims took title to them, no part of the property they lost because of petitioner's scheme was returned to them until they later sold the houses in exchange for money. The district court therefore properly calculated the offset due under Section 3663A(b)(1)(B)(ii) as the proceeds the victims recouped when they sold the properties after foreclosure.

Petitioner errs in contending (Br. 34-36) that, for purposes of the MVRA, he returned "the identical property that the victim[s] originally lost" when his victims took title to the collateral because the houses "temporarily" "store" the money's "value," if in a different "form." Br. 35. The money and the houses are not the same; petitioner took the money from the lenders and used it to purchase the houses. It is nonsensical to determine the "value" of the money according to the value of the houses. The money is worth what the money is worth—and no money is returned until some money is returned. There is equally little merit to petitioner's contention (Br. 23 n.9, 36) that the money he fraudulently obtained was no more liquid than the houses he purchased with it because he was obligated to use the money to purchase the houses. Under the MVRA, what is relevant is the value of the lost property to the victims, not to the defendant. Regardless of how liquid the money was from petitioner's perspective, it was perfectly liquid to the banks before he took it.

3. Petitioner's contrary reading of Section 3663A's text is mistaken in several respects.

First, petitioner argues (Br. 18-19) that the word "return" need not connote "the return of items formerly in another person's possession, but can include the giving of property to replace property previously received from that person." Br. 18. Although it is true that "return" may be used to convey that broader meaning, "[t]he ordinary meaning of 'return' is 'to bring, send, or put (a person or thing) back to or in a former position.'" *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting) (quoting *Webster's Third New International Diction-*

ary 1941 (1986)); see also *Merriam-Webster's Collegiate Dictionary* 1001 (10th ed. 1999) (defining "return" as "to restore to a former * * * state"). In construing any word's meaning in a statutory provision, this Court "follow[s] 'the cardinal rule that statutory language must be read in context [because] a phrase gathers meaning from the words around it.'" *Hibbs* v. *Winn*, 542 U.S 88, 101 (2004) (quoting *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 596 (2004)). As petitioner correctly points out, the word "return" cannot mean "return of items formerly in another person's possession," Br. 18, when it is used in a phrase such as "the grand jury returned an indictment." But when a person states that he "returned a sweater to a department store," everyone understands him to mean that he returned a sweater that formerly belonged to that store. A man could not purchase a pair of pants from a store and later "return" a sweater, expecting to receive in exchange the money he paid for the pants. In both examples, context gives meaning to the word "returned."

In the context of Section 3663A, Congress plainly intended the word "return" to mean "return to a victim property that the victim formerly had possession of." That meaning is apparent in Congress's use of the phrase "the property" every time it uses a form of the verb "return." 18 U.S.C. 3663A(b)(1)(A) and (B). As discussed, "the property" referenced in Section 3663A(b) is the property that was lost by the victim as a result of a defendant's criminal offense. In that context, references to a "return" of "the property" are limited to actions that actually restore possession of the lost property to the victim. When a defendant gives his victim a horse instead of the car that he

fraudulently obtained from the victim, he may compensate the victim for her loss, but he does not "return the property" (or "any part of the property") that was "damage[d]" or "los[t]" or "destr[oyed]." 18 U.S.C. 3663A(b)(1), (b)(1)(A), and (b)(1)(B)(ii). The same is true here: because the houses petitioner purchased were not any part of the property he fraudulently obtained from his victims, no part of the relevant property was returned to the victims when they took title to the houses.

Second, petitioner argues (Br. 19) that Congress's use of the word "any" in the phrase "any part of the property that is returned" means that a defendant may substitute any thing of value for the property that was lost. That argument fails for the same reason. Even under the most expansive interpretation of the word "any," a house is not "any part of the property" petitioner fraudulently obtained from his victims, who lent him money.

Third, petitioner argues (Br. 17-18, 21) that Congress's use of the passive phrase "is returned" somehow indicates that a victim's acquisition of substitute property that once belonged to a defendant qualifies as a "return[]" of "any part of the property" that was lost. 18 U.S.C. 3663A(b)(1)(B)(ii). By using the passive voice, however, Congress merely intended to cover situations (such as this one) in which a victim indirectly reacquires some or all of the property a defendant took from it. Here, for example, petitioner's victims had some part of the property they lost returned to them when they sold the houses to which they had obtained title through foreclosure. Although petitioner did not himself return any lost property to his victims, Congress's use of the passive voice en-

sures that he nevertheless is entitled to an offset for the portion of the money his victims were able to recoup on their own. But that phrasing does not alter the meaning of "the property," which refers only to the property that was lost.

Finally, petitioner errs in arguing (Br. 21-25) that the phrase "the property" in Section 3663A(b)(1)(B)(ii) refers to substitute property because it applies only when the return of the original property is impossible, impracticable, or inadequate. Paragraph (B) of Section 3663A(b)(1) applies in situations in which "return of the property" that was lost as a result of a defendant's offense is "impossible, impracticable, or inadequate" and Subparagraph (i) generally requires a defendant to compensate his victims for the value of the lost property. 18 U.S.C. 3663A(b)(1)(B)(i). But property that is lost as a result of a crime often can be returned in part even when return of the full property is impossible, impracticable, or inadequate. And Subparagraph (ii) applies in those cases, requiring a defendant to return "any part of the [lost] property" he can and providing an offset for the return of that portion of the property. 18 U.S.C. 3663A(b)(1)(B)(ii).

Although petitioner acknowledges the possibility that Subparagraph (ii) applies where a "defendant has disposed of some of the original property but has kept some other divisible part," he dismisses that straightforward interpretation of the statutory language because it would have only "a narrow range of application." Br. 23. Nothing in the statute indicates that every subparagraph should apply in every case—each provision applies to the set of cases it describes and Subparagraph (ii) applies when it is possible to return "any part of the property" that was damaged, lost, or

destroyed, but not all of it. 18 U.S.C. 3663A(b)(1)(B)(ii). Because Section 3663A applies to "any offense committed by fraud or deceit," 18 U.S.C. 3663A(c)(1)(A)(ii), moreover, it covers a large number of crimes resulting in a loss of money (or other fungible property) by the victim. In such cases, a defendant may well have retained a portion of the ill-gotten gains at the time of prosecution or sentencing.

Subparagraph (ii) also applies when property was damaged (but neither lost nor destroyed) as a result of a defendant's crime. In those cases, a defendant can return the original (damaged) property to the victim, but such property may be "inadequate" to compensate the victim for the full amount of its loss. 18 U.S.C. 3663A(b)(1)(B). Section 3663A would require a defendant to compensate the victim for the remaining value of the loss, but would also offset a restitution award by an amount equal to the value of the returned (damaged) property.[2] See S. Rep. No. 532, 97th Cong., 2d Sess. 32 (1982) ("The property restoration provision should require either that the condition of the returned property be at least as good as it was at the time of the offense, or that the defendant should pay for restoring it to that condition.") (in reference to MVRA's predecessor law, which contained substantively identical language).

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[2] Petitioner errs in contending that the original property that was taken from the victims in this case—in petitioner's words, "the money loaned to [petitioner] in 2005"—"was not returnable and was not returned." Br. 25. As this Court has repeatedly recognized, "[m]oney is fungible." *Ransom* v. *FIA Card Servs., N.A.*, 131 S. Ct. 716, 729 (2011); *Sabri* v. *United States*, 541 U.S. 600, 606 (2004). Because one dollar is the same as any other dollar, repayment of misappropriated cash by any other cash qualifies as the return of the ill-gotten money.

B. The Structure Of The MVRA Confirms That The Property That Is Taken From A Lender In A Mortgage-Fraud Case Is Returned To The Lender Only When The Lender Sells Collateral It Obtained Through Foreclosure

Petitioner relies (Br. 25-28) on Section 3664's allowance of in-kind payments to satisfy a defendant's restitution obligation, arguing that it would be "bizarre" to allow such payments after sentencing but not before. Br. 27. In so arguing, petitioner misapprehends the distinct functions of Sections 3663A and 3664. As this Court explained (with reference to substantively identical provisions of the MVRA's predecessor) in *Hughey*, Section 3663A (formerly 18 U.S.C. 3579 (1982)) determines "the *amount* of restitution" a defendant may be required to pay to compensate his victim's losses while Section 3664 (formerly 18 U.S.C. 3580 (1982)) "delineates '[p]rocedure[s] for issuing order[s] of restitution.'" 495 U.S. at 418 (brackets in original). Section 3663A ties the amount of restitution to the amount of loss a victim suffers because of a defendant's crime. Section 3664 dictates how a court may ensure that a defendant actually pays the amount due under Section 3663A.

Petitioner is correct (Br. 25-26) that Section 3664 permits a district court to order a defendant to fulfill a restitution order with "in-kind payments," including "replacement of property." 18 U.S.C. 3664(f)(3)(A) and (4)(B). As petitioner acknowledges (Br. 27), however, the provisions of Section 3664 do not govern the calculation of restitution under Section 3663A. See *Hughey*, 495 U.S. at 418 ("[I]t would be anomalous to regard [Section 3664], which delineates '[p]rocedure[s] for issuing order[s] of restitution,' rather than [Sec-

tion 3663A], which governs the court's authority to issue restitution orders, as fixing the substantive boundaries of such orders."). Indeed, far from supporting petitioner's interpretation of Section 3663A, Congress's allowance of in-kind payments in Section 3664 and omission of such payments in Section 3663A strongly indicate that Congress did not intend such payments to be included in the calculation of an offset under Section 3663A(b)(1)(B)(ii). See *Nken* v. *Holder*, 556 U.S. 418, 430 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets in original) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)).

Section 3664's allowance of in-kind payments as one payment option reflects Congress's judgment that, although a sentencing court must order restitution "in the full amount of each victim's losses * * * without consideration of the economic circumstances of the defendant," 18 U.S.C. 3664(f)(1)(A), "[u]pon determination" of that amount, the court must consider the defendant's economic circumstances in fashioning "the manner in which, and the schedule according to which, the restitution is to be paid," 18 U.S.C. 3664(f)(2). The offset in Section 3663A(b)(1)(B)(ii) is a tool for determining the full amount of each victim's actual losses. It does not consider any in-kind compensation a victim may have received. The same is true with respect to a victim's receipt of "compensation with respect to a loss from insurance or any other source"—a court may not consider such compensation "in determining the amount of restitution," 18 U.S.C.

3664(f)(1)(B), but must credit "any amount later recovered as compensatory damages for the same loss by the victim in" any federal or state civil proceeding against the restitution award, 18 U.S.C. 3664(j)(2). Neither an insurance payment for stolen property nor an in-kind payment of substitute property (such as collateral) restores "the property" that was lost to a victim. Thus, neither is considered in measuring a victim's loss. But because both types of payment have value, they may be credited against a defendant's ultimate restitution obligation.

C. The Purpose Of The MVRA Confirms That The Property That Is Taken From A Lender In A Mortgage-Fraud Case Is Returned To The Lender Only When The Lender Sells Collateral It Obtained Through Foreclosure

Petitioner's approach is also inconsistent with the "substantive purpose" of the MVRA "to assure that victims of a crime receive full restitution" for the losses caused by the defendant's offense. *Dolan* v. *United States*, 130 S. Ct. 2533, 2539 (2010); see *Hughey*, 495 U.S. at 416 ("[T]he ordinary meaning of 'restitution' is restoring someone to a position he occupied before a particular event.").

1. When an institutional lender is wrongfully deprived of money by a defendant's scheme, the lender's possession of other property—even collateral that secured the fraudulent loan—does not restore the victim to its pre-crime state and thus does not erase the victim's loss for purposes of the MVRA. Nor does mere possession by the lender of title to the collateral partially offset the victim's loss—because a lender cannot extract value from the foreclosed property until the property is sold. See J.A. 153 ("The victim-lender was defrauded out of cash and wants cash back; the victim

does not want the houses and they do not, in any way, benefit from possessing title to the houses until they are converted into cash upon resale."). Valuing surrendered collateral when the lender sells it rather than when foreclosure occurs effectuates the purpose of the MVRA because only when the lender recoups the sale proceeds is "any part of the property" the lender lost returned to it. 18 U.S.C. 3663A(b)(1)(B)(ii).

Although petitioner submits that the district court should have valued the offset as the value of the collateral at the time of foreclosure, he does not spell out how that "value" should be measured. His argument suggests (see Br. 31), however, that the court should have used the foreclosure sales prices. But the foreclosure prices neither capture the real value of the collateral at that time nor (more importantly) accurately reflect the value of the collateral to the victims. See Catharine M. Goodwin, *Federal Criminal Restitution* § 7.7, at 269 (2013 ed.) (noting that, under the MVRA, "courts generally look to what measure of value would best restore or compensate the victim to the victim's pre-offense condition"). That value is accurately measured as the price for which the lenders later sell each house.

Fair market value reflects "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction." *Black's Law Dictionary* 1691 (9th ed. 2009); see also Restatement of Restitution § 151 cmt. b (1937) ("The value of property is its exchange value measured in money, or the amount for which it could be exchanged if there were an open market with a wide opportunity for buyers."). But as this Court has acknowledged, "market value, as it is commonly understood, has no

applicability in the forced-sale context; indeed, it is the very *antithesis* of forced-sale value." *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); see *id.* at 538 ("In short, 'fair market value' presumes market conditions that, by definition, simply do not obtain in the context of a forced sale."). Relying on the assessed value of property at the time of foreclosure would also be an unreliable method of determining the value of collateral to a victim lender. As the court of appeals correctly explained, "real property is not liquid and, absent a huge price discount, cannot be sold immediately." J.A. 163. Any reconstructed appraisal at the time of foreclosure is therefore unlikely to capture the relevant liquidity value of collateral to the lender.

2. Petitioner's construction of Section 3663A's offset provision is also inconsistent with Congress's intent to avoid prolonged or unnecessarily complicated sentencing proceedings. In enacting the MVRA, Congress sought not only to ensure "full restitution to all identifiable victims of covered offenses" but also to "guarantee[] that the sentencing phase of criminal trials do not become fora for the determination of facts and issues better suited to civil proceedings." 1995 Senate Report 18; see also *id.* at 19 ("In all cases, it is the committee's intent that highly complex issues related to the cause or amount of a victim's loss not be resolved under the provisions of mandatory restitution."). In contrast to the relative ease of calculating the offset by using the actual sale price of the collateral, petitioner's approach would require sentencing courts to estimate the value of the collateral at a time when it was not sold under normal market conditions (itself a difficult undertaking) and at a time that is

potentially years before the date of the restitution hearing.

Petitioner argues (Br. 39) that valuing collateral at the time a lender sells it would undermine the MVRA's efficiency purpose because such a sale might take place "years" after sentencing. The factual premise of petitioner's argument is mistaken. In a typical mortgage-fraud case (as here), a lender will foreclose on a house and resell it long before a defendant is convicted and sentenced for the underlying fraud. See Elizabeth Renuart, *Toward a More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 Loy. Consumer L. Rev. 562, 570 n.47 (2012) (Renuart) (noting that nearly 80% of homes purchased at foreclosure by banks in 2006 were resold within a year).[3] In the unusual case in which a

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[3] Petitioner cites (Br. 39) two cases to support his claim that victims may wait years before selling the collateral—but neither case supports his claim that any delay in reselling collateral will undermine the purposes of the MVRA. The two-year wait in *United States* v. *Hutchinson*, 22 F.3d 846, 856 (9th Cir. 1993), abrogated on other grounds by *United States* v. *Wells*, 519 U.S. 482 (1997), occurred not only before sentencing, but also before the operative indictment was filed. See Appellant's Br. at 2-3, 31-32, *United States* v. *Hutchison*, 983 F.2d 1497 (9th Cir.), superseded by 22 F.3d 846 (9th Cir. 1993) (Nos. 91-10225, 91-10598). And the Fifth Circuit's decisions in *United States* v. *Holley*, 23 F.3d 902 (*Holley I*), cert. denied, 513 U.S. 1043 (1994); 149 F.3d 1178, 1998 WL 414260 (July 9, 1998) (*Holley II*), illustrate the difficulties inherent in petitioner's reading of the MVRA. In *Holley I* (a case governed by the MVRA's predecessor statute and involving a fraudulent scheme to finance the purchase of a shopping center), the court of appeals agreed with petitioner's interpretation and held that the lost property was returned when the victim purchased the collateral at a trustee's sale. 23 F.3d at 914-915. On remand, however, the district court valued the offset as the amount the victim sold

lender has not yet sold the collateral by the time of sentencing, the district court may sentence a defendant while postponing the entry of a restitution order until the sale takes place. See *Dolan*, 130 S. Ct. at 2539-2540; *United States* v. *Bowling*, 619 F.3d 1175, 1187 (10th Cir. 2010) (approving district court's retaining jurisdiction to modify the restitution order as necessary upon victim's further recovery of property). The MVRA "provides adequate authority to * * * essentially fill in an amount-related blank in a judgment that ma[kes] clear that restitution [is] applicable." *Dolan*, 130 S. Ct. at 2544 (internal quotation marks omitted).

3. Petitioner errs in contending (Br. 36-40) that the court of appeals' interpretation of Section 3663A(b)(1)(B) will create anomalous results that undermine the statute's purposes.

First, petitioner is incorrect (Br. 38-40) that measuring the amount of "the property" that "is returned" to a lender under Section 3663A(b)(1)(B)(ii) as the proceeds from a post-foreclosure sale will produce windfalls for victims in mortgage-fraud cases. If sale

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the collateral for six years after taking title to it. The court of appeals affirmed in *Holley II*. The court rejected the defendant's argument that the district court should have relied on appraisals of the collateral's worth at the time the victim took title to it, explaining that neither the foreclosure sale price nor the defendant's appraisals reliably determined the collateral's value. The court found "no evidence that anyone was willing to purchase the property for any amount of money, prior to its sale" by the victim and approved the district court's finding that, "by holding onto the property through the nadir of the Texas real estate market, the bank was able to command a higher price in 1993 than it would have received in 1987," thereby increasing the defendant's offset. *Holley II*, 1998 WL 414260, at *1-*2.

proceeds exceed the amount of money a victim lender lost, a court cannot order the defendant to pay any amount of restitution *for that loss*. See *United States* v. *Boccagna*, 450 F.3d 107, 117 (2d Cir. 2006) ("[The court] cannot award the victim 'a windfall,' i.e., more in restitution than he actually lost."). In contrast, under petitioner's view, any increase in the value of collateral between foreclosure and later sale seemingly could not be included in the offset even though the victim will have recouped (in cash) an amount equal to the increase in value. If the ultimate sales price could not be credited against restitution, it *would* award a windfall to victims at the expense of defendants. See J.A. 156-157 (explaining that the MVRA cannot be interpreted as "a one-way ratchet" pursuant to which "the victimizers," and not "the victims" would always have the advantage) (citations omitted).

Second, none of the hypothetical situations petitioner posits (Br. 36-37) would undermine the purposes of the MVRA under the government's view. Petitioner first imagines (*ibid.*) a consumer who spends $20,000 to purchase a car with a rolled-back odometer that is actually worth only $16,000. Petitioner misunderstands the operation of Section 3663A in contending (Br. 37) that calculation of the appropriate restitution would vary depending on how much the consumer later resold the car for. In petitioner's hypothetical, the victim consumer was not fraudulently deprived of $20,000 that the fraudulent dealer promised to pay back. The victim consumer was fraudulently deprived of a car worth $20,000 when she instead received a car worth only $16,000. Her loss is therefore easy to

calculate ($4000) and the offset provision in Section 3663A(b)(1)(B)(ii) does not apply.[4]

Petitioner's fanciful hypothetical (Br. 37) about a "remorse-stricken arsonist" who volunteers a cash payment to his victim also would not lead to an untoward result under the government's interpretation of Section 3663A(b). The victim's actual loss under Section 3663A(b)(1)(B) is the value of his destroyed home; the defendant's cash payment does not offset that amount. Once that value is determined, however, a defendant would get *credit* for that cash payment against his restitution obligation to prevent double recovery to the victim. See *United States* v. *Bright*, 353 F.3d 1114, 1121 (9th Cir. 2004) ("In its current form, § 3664 directs the court to order restitution of the full amount of a victim's loss * * * *without regard to other sources of compensation for the victims*. Any such offsets are instead to be handled separately as potential credits against the defendant's restitution obligation—not as reductions in the amount of that obligation in the first instance."); see also *United States* v. *McDaniel*, 398 F.3d 540, 554-555 (6th Cir. 2005) (holding that, because the MVRA does "not permit victims to obtain multiple recoveries for the same

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[4] To alter the hypothetical somewhat, if a defendant stole a woman's car and the woman received an insurance payment for that car, the victim of the property crime would be the insurance company—and the victim's lost property would be money. If the stolen car were later recovered and handed over to the insurance company, calculation of the company's losses for restitution purposes should be offset by the price for which the company later sells the car. See *United States* v. *Mahone*, 453 F.3d 68, 73-74 (1st Cir. 2006) (approving offset based on the money the insurer received from selling the recovered car rather than the car's suggested retail value on the date it was returned to the victim).

loss," the district court must reduce defendant's restitution amount by the amount already paid as restitution to victims in state-court actions).

D. Petitioner Directly And Proximately Caused The Victim Lenders' Losses, Including Those Reflected In The Collateral's Loss Of Value

1. Petitioner also argues (Br. 28-30) that a court may not order him to pay the difference between the value of the collateral at the time of foreclosure and its later sale price because his criminal scheme was not the "cause" of the drop in value. Petitioner is incorrect. The MVRA incorporates traditional criminal-law principles of causation. The term "victim" for restitution purposes is defined as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." 18 U.S.C. 3663A(a)(2). And the statute provides that the government bears "[t]he burden of demonstrating the amount of loss sustained by a victim as a result of the offense." 18 U.S.C. 3664(e). The word "result" "plainly suggests causation." *Pacific Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 690 (2012).

Criminal law generally analyzes questions of causation under the rubric of both "cause in fact" and "'legal' or 'proximate' cause." 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003). Petitioner does not appear to dispute that his fraudulent scheme was a "cause in fact" of the victims' losses and of the reduced amount of money returned to the victims because of the downturn in the housing market. If not for petitioner's fraud, the lenders would not have loaned him hundreds of thousands of dollars and would not have found themselves in possession of the houses he purchased with that money. *Ibid.* (noting

that "cause in fact * * * usually (but not always) means that but for the conduct the result would not have occurred"). Petitioner mistakenly argues (Br. 28-30), however, that his fraud was not the legal or proximate cause of the reduction in money returned to his victims because of the houses' depreciation between the foreclosures and subsequent sales.

"[T]he phrase 'proximate cause' is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2642 (2011). The Court generally uses the phrase "to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). This Court has treated proximate cause as "a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.'" *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (quoting *Holmes*, 503 U.S. at 272 n.20). Each articulation of proximate cause is intended to "guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 537 (1983). In the case of the restitution remedy under the MVRA, the appropriate test must reflect Congress's intent to fully compensate victims for their losses, while enabling sentencing courts to expeditiously determine restitution by excluding losses that are only tenuously linked to the offense. See *Holmes*, 503 U.S. at 268 ("At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possi-

ble and convenient.'") (quoting William P. Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 264 (5th ed. 1984)).

Courts of appeals applying the MVRA's proximate-cause requirement—like Justices of this Court in other contexts—have characterized the proximate-cause inquiry in different ways. Some have required a "'direct relation[ship] between the injury asserted and the injurious conduct alleged,'" *United States* v. *Church*, 731 F.3d 530, 538 (6th Cir. 2013) (quoting *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 9 (2010)), rejecting a "link that is 'too remote,' 'purely contingent,' or 'indirec[t],'" *United States* v. *Evers*, 669 F.3d 645, 659 (6th Cir. 2012) (quoting *Holmes*, 503 U.S. at 268, 271, 274) (brackets in original). Others have considered whether an injury was a "foreseeable" consequence of a defendant's wrongful act. See *United States* v. *Marino*, 654 F.3d 310, 324 (2d Cir. 2011); see also *McBride*, 131 S. Ct. at 2652 (Roberts, C.J., dissenting); *Hemi Grp., LLC*, 559 U.S. at 22-23 (Breyer, J., dissenting); see also Pet. Br. 29. And others have looked to whether there was an intervening or superseding cause that was not "directly related to the defendant's conduct." *United States* v. *Kennedy*, 643 F.3d 1251, 1262-1263 (9th Cir. 2011); see *United States* v. *Wilfong*, 551 F.3d 1182, 1187 (10th Cir. 2008), cert. denied, 556 U.S. 1215 (2009); *United States* v. *Robertson*, 493 F.3d 1322, 1334 (11th Cir. 2007), cert. denied, 552 U.S. 1212 (2008); see also *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 837 (1996); *Miller* v. *Union Pac. R. Co.*, 290 U.S. 227, 235 (1933); Pet. Br. 29.

2. Petitioner argues that the courts below improperly required him to "pay for any decline in the houses' values between the time the lenders fore-

close[d] and the time the lenders res[old]" the houses even though he did not directly or proximately cause that decline in value. Br. 29. Petitioner is mistaken.

First, although proximate-cause principles limit the types of losses for which a defendant is responsible in the first instance, they have no bearing on the offset provision in Section 3663A(b)(1)(B)(ii). There is no dispute that petitioner's criminal conduct directly and proximately caused his victims to initially lose $330,000 and $141,000, respectively. Principles of causation do not bear on the determination of when "any part of the property" that was lost is returned to a victim. 18 U.S.C. 3663A(b)(1)(B)(ii). As the Second Circuit has explained in a securities-fraud case:

> The fact that independent market forces may have contributed to the decline in [collateral] held by [brokerage houses] is irrelevant to the restitution calculation, because the stock was merely securing the fraudulently-obtained loans. The loss to the brokerage houses resulted from [defendant's] inducement of the loans, and it is for this loss that [defendant] must provide restitution.

United States v. *Paul*, 634 F.3d 668, 678, cert. denied, 132 S. Ct. 538 (2011).

Second, petitioner is incorrect (Br. 29) that the victims' retention of the collateral after they acquired title was an intervening event that broke the causal chain. Courts of appeals that have considered whether an intervening event broke the chain of causation for restitution purposes have generally agreed that an intervening event that is "directly related to the offense conduct" does not defeat a chain of causation. See, *e.g.*, *United States* v. *Speakman*, 594 F.3d 1165, 1172 (10th Cir. 2010); see also *Church*, 731 F.3d at 538

(6th Cir.); *United States* v. *Berger*, 473 F.3d 1080, 1107 (9th Cir. 2007), cert. denied, 552 U.S. 1097 (2008). Here, that direct relationship is manifest. As the court of appeals explained, "[a]bsent [petitioner's] fraudulent loan applications, the victim lenders would not have loaned the money in the first place" and "would not have had to foreclose on and then resell the real estate in a declining market at a greatly reduced value" after petitioner defaulted on the loans. J.A. 155. "The declining market only became an issue because of [petitioner's] fraud." J.A. 156.[5]

Third, petitioner also errs in suggesting that the courts below should have essentially awarded petitioner a credit against his restitution award to account for the decrease in value of the collateral because the downturn in the real estate market was "unforeseeable." Br. 29. Even if foreseeability were always required to establish proximate cause—which it is not, see *Hemi Grp., LLC*, 559 U.S. at 12—it was certainly foreseeable that the value of the collateral petitioner used to secure his fraudulently obtained loans would fluctuate. By its very nature, the housing market gains and loses value over time. A defendant who fraudulently obtains loan proceeds and then depends

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[5] If a victim lender opts to dispose of collateral in a manner that is not a fair market transaction, it may be appropriate not to use the sales price to value the returned property because a non-market transaction is generally not a good basis for measuring value. See, *e.g.*, *Boccagna*, 450 F.3d at 109-120 (after the United States Department of Housing and Urban Development foreclosed on collateral securing fraudulently obtained loans, it sold the properties to a New York City housing agency for nominal prices as low as one dollar; the court of appeals reversed the district court's use of nominal sales prices rather than fair market value to measure the restitution offset).

on the foreclosure of the collateral to partially compensate his victims for their loss predictably (and by his own volition) ties the amount of restitution he will have to pay to the health of the housing market.

Fourth, petitioner's case-specific arguments (Br. 29-30) have no basis in fact. Petitioner insists that "the lenders could have disposed of the property long before the resale dates and thus avoided the declines." Br. 29. Nothing in the record supports that assertion. On the contrary, to the extent that the record speaks to the issue at all, it shows that there were no ready buyers when foreclosure occurred. See J.A. 89 (testimony that no one bid on the Inlet Shores property at the sheriff's sale); J.A. 70-71 (MGIC placed the Grant Street property on the market and periodically got updated values from its broker when the property did not sell). It is also incorrect as a general matter that a bank may resell foreclosed property the instant it acquires it after default. See Renuart 571 ("A bank with [real-estate-owned] inventory is faced with property it does not want to own, possible title, repair, lien, and tax issues that it must clear before it can sell, mounting maintenance costs, and other headaches."); see also J.A. 63-66 (after taking title to house, MGIC had to inspect the property, invest in maintenance, and ensure clear title before placing the house on the market).

Finally, petitioner's view of Section 3663A(b)(1)(B)(ii) would require victims to bear the full risk of loss from a declining market and award the full benefit of any gain to the defendant. Such an allocation of risk gets it exactly backwards for purposes of the MVRA. See *United States* v. *Rhodes*, 330 F.3d 949, 954 (7th Cir. 2003) ("[The defendant], rather than the victims,

should bear the risk of forces beyond his control.") (quotation marks and citation omitted). The text of the MVRA itself allocates the risk of declining value to a defendant, requiring the defendant to compensate a victim for "the greater of" the value of the lost property on the date of loss or the date of sentencing. 18 U.S.C. 3663A(b)(1)(B). "To accept [petitioner's] argument would be to encourage would-be fraudsters to roll the dice on the chips of others, assuming all of the upside benefit and little of the downside risk." *United States* v. *Turk*, 626 F.3d 743, 750 (2d Cir. 2010). The government's view also maintains proper incentives for victim lenders in mortgage-fraud cases. Because most defendants lack significant financial resources with which to promptly pay a restitution award, lenders have every incentive to minimize their net losses by selling foreclosed collateral reasonably quickly in a declining housing market. If a lender takes title to a house when the real estate market is on an upswing, any delay in selling the house will inure to the benefit of the defendant in the form of a larger offset.

E. Mortgage Law Principles Do Not Dictate The Amount Of Offset Petitioner Is Entitled To Under The MVRA

Petitioner argues (Br. 30-34) that the court of appeals "failed to undertake any analysis of well-established principles of state mortgage law in dismissing [petitioner's] argument that the collateral served as replacement property for the lost loan proceeds." Br. 30. Petitioner's argument fails for several reasons.

First, because the MVRA is not specific to mortgage fraud, the meaning of its generally applicable terms should not be distorted based on principles of

mortgage law. Petitioner argues that, "when a lender forecloses and takes title to the [collateral], foreclosure law values the [collateral] as of the date the lender takes title, not as of the date the [collateral] is sold." Br. 32; see *ibid.* (noting that a lender is generally entitled to a deficiency judgment for the difference between the outstanding loan amount and the value of the home at the time of foreclosure). Those foreclosure practices say nothing, however, about the meaning of the phrase "any part of the property" in Section 3663A(b)(1)(B)(ii). As discussed at pp. 13-24, *supra*, Section 3663A(b)(1) does not talk about collateral or substitute property—it refers to "property of a victim" that is "damage[d]" or "los[t]" or "destr[oyed]" as a result of a defendant's criminal conduct. The value of collateral on the date the victim takes title to it does not mitigate the loss because no part of "the property" that was lost has been returned to the victim on that date.

More broadly, the mandatory provisions of the MVRA apply to a wide swath of crimes, including many that have nothing to do with mortgages. The meaning of Section 3663A(b)(1)(B)(ii)'s reference to a return of "any part of the property" should be consistent across the MVRA's applications; that could not happen if the phrase had a special meaning in the mortgage-fraud context. And requiring such a context-specific interpretation of the statutory text would be directly contrary to the statute's mandate that the sentencing court shall order restitution "[n]otwithstanding any other provision of law." 18 U.S.C. 3663A(a)(1). The district court therefore correctly determined the amount of restitution petitioner must pay under the MVRA notwithstanding any provision

of mortgage law that may govern the state-law rights of lenders.

Second, petitioner is incorrect (Br. 19-20, 30-34) that the district court should have valued the collateral for offset purposes as of the date the lenders took title because "the lenders accepted the collateral as *full satisfaction* of their claims." Br. 34. Initially, if petitioner were correct that obtaining title to the collateral fully compensated the lenders for their losses, petitioner would not owe any restitution at all. Even petitioner does not go that far. Instead, he contends that, in extending a mortgage, a lender "commit[s] to accept[] the real estate collateral as a replacement for the loan proceeds" for all purposes. Br. 32. That is incorrect.

Where, as here, a lender forecloses on collateral and agrees to waive its right to pursue a deficiency claim on the remainder of the defaulted loan, the lender essentially settles its legal claim against the borrower. Such a settlement is not tantamount to an agreement that the collateral alone is equivalent in value to the amount of the lender's loss (*i.e.*, the amount of the outstanding loan) any more than a settlement of any civil action indicates that the plaintiff believes the settlement terms fully compensate her losses. The loss a victim suffers because of another party's unlawful or tortious conduct is determined by the consequences of that conduct, not the amount the victim is willing to accept in exchange for foregoing a civil remedy. The MVRA plainly contemplates that a victim remains entitled to restitution even if it has received partial compensation for its losses. See 18 U.S.C. 3664(f)(1)(B) and (j)(2). It also commands that "[i]n no case shall" a determination of "the amount of

restitution" take into account any compensation a victim has received with respect to a relevant loss from insurance or any other source. 18 U.S.C. 3664(f)(1)(B). The only relevant data point in adjusting the amount of restitution due is how much of the property that was actually lost has been returned to a victim as of sentencing. Cf. *United States* v. *Bearden*, 274 F.3d 1031, 1041 (6th Cir. 2001) (holding that "a private settlement between a criminal wrongdoer and his victim releasing the wrongdoer from further liability does not preclude a district court from imposing a restitution order for the same underlying wrong"); *United States* v. *Gallant*, 537 F.3d 1202, 1249-1250 (10th Cir. 2008) (holding that victim's settlement agreement with defendants that released them from further liability did not bar restitution), cert. denied, 556 U.S. 1198 (2009).

Finally, courts should not conflate foreclosure and criminal-restitution rules because different policy priorities inform the allocation of benefits in each context. Rules governing foreclosure have developed based on concerns about market forces, notice, fairness, and efficiency. See generally 1 Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* §§ 7.6, 7.18, 7.30, at 782-786, 843-845, 919-920 (5th ed. 2007) (discussing policy reasons supporting the right to foreclosure and different methods of implementing foreclosures). Restitution, in contrast, serves different goals. The primary goal of restitution is to compensate victims for their losses. But Congress also mandated restitution for certain crimes under the MVRA "to mete out appropriate criminal punishment for" the offense conduct. *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005); see 1995 Senate Re-

port 12 (noting that one purpose of the MVRA is to "ensure that the offender * * * pays the debt owed to * * * society); see also *United States* v. *Dubose*, 146 F.3d 1141, 1144 (9th Cir.) ("[R]estitution under the MVRA is punishment because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes."), cert. denied, 525 U.S. 975 (1998). The allocation of risks and benefits in mortgage and foreclosure law thus has no bearing on determining the criminal restitution award required in this case.[6]

F. The Rule Of Lenity Does Not Apply

Petitioner is incorrect (Br. 40-42) that the rule of lenity applies here. The rule of lenity is a tie-breaking rule of statutory construction that applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (internal quotation marks and citations omitted). Neither "[t]he mere possibility of

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[6] In addition, petitioner did not rely on principles of mortgage law in the district court or the court of appeals. It is hardly surprising, therefore, that neither court below took such principles into account. Indeed, to the extent petitioner made any reference to mortgage law in the district court, he appeared to argue that the foreclosure proceedings were not relevant at all to the restitution determination. Petitioner argued that the Seventh Circuit had "ma[d]e clear" that "restitution is no synonym for common law damages" and that considering common-law damages "would complicate criminal sentencing unduly and unnecessarily." J.A. 113. Petitioner then stated that his victims "ha[d] a shot at collecting common law damages" and took advantage of that opportunity through foreclosure—and that consideration of those proceedings "complicated this sentencing." *Ibid.*

articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of th[e] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule of lenity applies "only if, after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citations omitted). "Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved." *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000).

No such equipoise exists here. The plain text of Section 3663A(b)(1)(B)(ii) requires the sentencing court to assess the value of any offset to a victim's loss as of the date "any part of the property" that was actually lost (here, money) is returned to the victim. That statutory text's meaning is plain and is consistent with the structure and purposes of the MVRA. The language is not ambiguous at all—and certainly not "grievous[ly]" so.[7]

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[7] Because petitioner did not argue to the district court that Section 3663A(b)(1)(B)(ii) requires the sentencing court to determine the amount of offset as the value of the collateral on the date that the victims took title to the houses, his argument must be reviewed for plain error. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 465-466 (1997); see also Gov't C.A. Br. 11-12. To establish reversible plain error, a defendant must show (1) that there was an error, (2) that was obvious, (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-467. The court of appeals did not address whether petitioner's argument should be reviewed for plain error. If this Court were to conclude that the district court and court of appeals erred in their construc-

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
KIRBY A. HELLER
Attorney

JANUARY 2014

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tion of Section 3663A(b)(1)(B)(ii), it should remand for application of plain-error review by the court of appeals in the first instance.

STATUTORY APPENDIX

1. 18 U.S.C. 3663A provides:

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

2. 18 U.S.C. 3664 provides:

§ 3664. Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the

court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and

without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in

the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that

all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or

require immediate payment in full, as the interests of justice require.

(*l*) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other

judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(*o*) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

REPLY BRIEF

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No. 12-9012

IN THE

Supreme Court of the United States

BENJAMIN ROBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

JEFFREY T. GREEN
JACQUELINE G. COOPER
DAVID R. KUNEY
JEFFREY S. BEELAERT
ADAM N. HALLOWELL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

JOSH C. HESS
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree St., N.E.
Atlanta, GA 30309

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV. S. CT. PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611

CHRISTOPHER DONOVAN*
PRUHS & DONOVAN, S.C.
757 N. Broadway
Milwaukee, WI 53202
Donovanc34@hotmail.com
(414) 221-1950

JONATHAN E. HAWLEY
Chief Federal Public Defender
DANIEL T. HANSMEIER
Assistant Federal Public Defender
FEDERAL PUBLIC DEFENDER'S OFFICE
CENTRAL DISTRICT OF ILLINOIS
600 E. Adams Street, 2d Floor
Springfield, IL 62701

Counsel for Petitioner

* Counsel of Record

February 14, 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF

The Solicitor General acknowledges that the interpretation of the offset provision in the Mandatory Victims Restitution Act ("MVRA") depends on "context," Br. Resp't 18, but he inconsistently applies that rule in attempting to harmonize his version of the statute. To the Solicitor General, the word "return" is broad enough to encompass a return of fraudulently obtained real estate in some cases, *id.*, but he constrains "property" in this case to mean only "money." The Solicitor General cannot use context so arbitrarily, particularly when, as here, the context involves not a mere cash transaction, but rather a mortgage loan in which the lender expressly agreed—in advance—to accept the real-estate collateral to reduce or eliminate the balance of the funds owed. Moreover, in the Solicitor General's view, "money" is only fungible with other money and cannot, contrary to both economics and commerce, be fungible with credit or collateral.

In addition to its internal inconsistencies, the Solicitor General's construction of the statute is fundamentally atextual. Citing a few narrow provisions of 18 U.S.C. § 3664, the Solicitor General would read into that section a general scheme of "credits" that does not exist. Nor does repetition of the mantra "property equals only money" negate the application of § 3663A(b)(1)(B)(ii) because Congress expressly allowed for offsets when return of the specific property lost is not just "impossible," but also "impracticable" or "inadequate."

If that were not enough, the Solicitor General suggests that proximate-cause principles have "no bearing" on the interpretation of the offset provision even though the MVRA's definition of "victim" expressly

incorporates those principles. In the alternative, he conveniently redefines "proximate cause" to eliminate foreseeability. Thus, Mr. Robers and others like him would suffer the risk of lenders waiting until the depths of the housing crisis to dispose of the properties they held. Mr. Robers' approach, by contrast, requires only the routine judicial function of valuing property at the time of foreclosure and avoids further anomalies such as lenders keeping the properties or disposing of them at other than fair market value. Fundamental principles of mortgage law, too, are dismissed as a distortion of the MVRA, even though no such effect is identified and we are told elsewhere that context matters. The Solicitor General's statutory construction requires far too many contortions of reasoning to permit affirmance.

A. Under the Plain Text of the MVRA, the Proper Measure of the Offset Amount is the Value of the Houses as of the Date the Houses Were Returned to the Lenders.

The MVRA requires an offset to an order of restitution for "the value (as of the date the property is returned) of any part of the property that is returned." 18 U.S.C. § 3663A(b)(1)(B)(ii). In the mortgage loan context, as demonstrated here, when an individual defaults on a loan, the property returned is the home that secures the loan. The broad language of the MVRA easily includes the return of the home as "any part of the property that is returned." Thus, the defendant would be entitled to an offset based on the value of the home "as of the date" of its return.

The Solicitor General disagrees with this textual reading. He asks this Court to limit the offset provision to "the property that was lost." Br. Resp't 15. He asserts that the lost property in this case was "money," and, therefore, only the return of "money"

offsets the restitution order. Br. Resp't 12. In doing so, the Solicitor General draws a distinction between fungible and non-fungible property. Br. Resp't 21. If non-fungible property is lost, only the return of the *identical* non-fungible property offsets the restitution order. Br. Resp't 15, 18-19. But if fungible property is lost, then the return of the ***same kind*** of fungible property offsets the restitution order. Br. Resp't 21 n.2. The Court should reject this crabbed reading of the MVRA for several reasons.

1. The argument is based on a new and distorted premise. Below, the United States identified the lost property as "the money that was advanced to the borrower *for the purpose of purchasing real estate, with that real estate serving as collateral for the loan.*" J.A. 49 (emphasis added). But now, the Solicitor General truncates the property lost to "money" and nothing else. Br. Resp't 16. This "shifting and imprecise characterization of the alleged property at issue betrays the weakness of [the Solicitor General's] case." *Sekhar* v. *United States*, 133 S. Ct. 2720, 2727 (2013).

It is undisputed that, upon default, the lenders could not recoup the loan money because Mr. Robers invested that money in the homes, as the lenders required him to do.[1] So the homes were returned to the lenders via foreclosure proceedings. Under § 3663A(b)(1)(B)(ii), a return of "any part of the property" warrants an offset and, according to the prosecutors' definition of the property lost, return of the "real estate serving as collateral for the loan" would

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[1] The Solicitor General's approach treats this case as if Mr. Robers had simply pocketed the loan proceeds. But here, as in the bulk of mortgage transactions, Mr. Robers as the borrower never possessed the loan funds, which were wired directly to the settlement companies. Br. Pet'r 23 n.9.

constitute a return of some part of the property lost. *United States* v. *Holley*, 23 F.3d 902, 915 (5th Cir. 1994)[2]; *United States* v. *Boccagna*, 450 F.3d 107, 112 n.2 (2d Cir. 2006); *United States* v. *Smith*, 944 F.2d 618, 625 (9th Cir. 1991).

On the basis of his current, truncated definition of "property," the Solicitor General dismisses as "nonsensical" the concept that the collateral reflects the "stored value" of the loan funds. Br. Resp't 17. But such purported nonsense has persuaded others, in part because the offset provision's text—including the language "any part"—does not require that a victim recover property in precisely the same form, and indeed presumes on the basis of impossibility or impracticability that she will not. *United States* v. *Shepard*, 269 F.3d 884, 887-88 (7th Cir. 2001) (stolen money used to make improvements to a victim's house was "returned" when the victim regained beneficial use of the property); *Boccagna*, 450 F.3d at 112 n.2; *United States* v. *Reese*, 998 F.2d 1275, 1284 (5th Cir. 1993) ("[W]hen a lender accepts conveyance of

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[2] The Solicitor General contends that, on remand, the district court in *Holley* valued the offset as the amount for which the victim sold the collateral six years after taking title to it. Br. Resp't 27-28 n.3. That is incorrect. The district court properly set the offset as the value the property had when the victim took title, and simply used the later sales price as evidence of the house's value *at that earlier time*. *United States* v. *Holley*, No. 96-11160, 1998 WL 414260, at *1 (5th Cir. July 9, 1998). Likewise, in *United States* v. *Mahone*, 453 F.3d 68, 73-74 (1st Cir. 2006), when the defendant returned a stolen car to an insurer that had lost cash, the court did not determine the offset based solely on "the price for which the company later [sold] the car." Br. Resp't 30 n.4. Rather, the later sales price was merely "evidence of the vehicle's value" when the victim took possession, which was dispositive because, unlike in Mr. Robers' case, there was no suggestion that the property had decreased in value while the victim held it. *Mahone*, 453 F.3d at 74.

the secured property in lieu of foreclosure, the value of such property should constitute a partial return of the 'cash loan proceeds.'").

The Solicitor General concedes that the houses "undoubtedly had monetary value when the victims took title to them . . . ." Br. Resp't 16. He then asserts that, to the lenders, the money was more "valu[able]" than the houses Mr. Robers bought with the money. Br. Resp't 17. Even if that were true,[3] the value difference would be relevant only in deciding *how much* to reduce the restitution award. The question presented here is *whether* the sentencing court should reduce the award when the lenders acquired the houses or, as the Solicitor General argues, ignore that transaction entirely.

2. The Solicitor General justifies his shift from "mortgage loans to purchase homes" to "money" because money is "fungible." Br. Resp't 21 n.2. The Solicitor General would thus apply different rules under the offset provision to fungible property than to non-fungible property. Br. Resp't 15, 18-21. If the property is fungible, the return of the *same kind* of property would offset the restitution order. If the proper-

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[3] It is not true in this case because, pursuant to contractual and legal obligations, the lenders took back the properties and waived their right to a deficiency judgment. Complaint – Mortgage at 3, 12, *Mortg. Elec. Reg. Sys., Inc. as nominee for Paragon Home Lending, LLC* v. *Robers*, No. 05-01072 (Wis. Cir. Ct., Walworth Cnty., Dec. 6, 2005); Complaint – Mortgage at 3, 13, *Mortg. Elec. Reg. Sys., Inc., as Mortgagee of Record and as nominee of the Serv. GMAC Mortg. Co.* v. *Robers*, No. 05-01040 (Wis. Cir. Ct., Walworth Cnty., Nov. 30, 2005). Even the Solicitor General does not contend that the nature of these obligations somehow changed simply because fraud contributed to the default.

ty is non-fungible, then only the return of the *identical property* suffices.

This is not what Congress said in the MVRA. Indeed, Congress said the opposite in § 3664's in-kind provision. 18 U.S.C. § 3664(f)(4); see *infra* Section B. And for good reason. If the Solicitor General is correct, there is a serious risk of double recoveries and windfalls with respect to secured transactions. See *Boccagna*, 450 F.3d at 117. The Solicitor General takes it on faith that a lender will convert the non-fungible property into money. If this conversion never happens, however, the lender not only gets the property that was returned, but also an order of restitution in the full amount of the loan. For instance, if the lender keeps the property as a company retreat, or as a rental property, and receives an order of restitution for the full amount of its loss, then the lender receives a windfall. See T. Dietrich Hill, Note, *The Arithmetic of Justice: Calculating Restitution for Mortgage Fraud*, 113 Colum. L. Rev. 1939, 1962-63 & n.180 (2013).

The better reading of the statute, and the one that ensures full, but not overfull, compensation, is that it requires an offset of the value of the property that is actually returned, in this case real-estate collateral, on the date of its return. That is consistent with the text of the MVRA and does not require adding words to the statute. See, *e.g.*, *Dean* v. *United States*, 556 U.S. 568, 572 (2009) ("we ordinarily resist reading words or elements into a statute" (quoting *Bates* v. *United States*, 522 U.S. 23, 29 (1997))).

Contrary to the Solicitor General's claim, Mr. Robers' reading of the statute would not entail that his "restitution debt would have been fully satisfied when the lenders took title to the houses." Br. Resp't 16. The value of the homes, as of the date of their re-

turn, only offsets the restitution order, which must be for the full amount of the victim's losses. If the values were less than the restitution order, then the debt would not be fully satisfied.

3. The Solicitor General further concedes that the meaning of the word "returned" depends on context and can be something other than "return of items formerly in another person's possession . . . ." Br. Resp't 18. And he admits that the lenders "had some part of the property they lost *returned* to them when they sold the houses" after foreclosure. Br. Resp't 19 (emphasis added). This is so even though Mr. Robers did not himself participate in that return. *Id.*

If the concept of "return" in the MVRA is so broad in scope, then it would be odd to interpret the phrase "any part of the property that is returned" in a way that wholly ignores the return of the collateral real estate to the victims. Even the Solicitor General concedes that "the houses at issue in this case undoubtedly had monetary value when the victims took title to them." Br. Resp't 16. The only way the Solicitor General is able to avoid Mr. Robers' more natural reading of the offset provision is to redefine the word "property" to mean only money. But he should not be allowed to divorce the term "property" from this established context and thus ignore foreclosure proceedings altogether.

The Solicitor General's selective parsing of the offset provision makes irrelevant his stamp-collection-for-a-gold-necklace and horse-for-a-car examples. Br. Resp't 15, 18-19. Unlike in those examples, Mr. Robers returned property the victims had previously agreed to accept. Indeed, the return of the real estate that secures a mortgage loan is inherent in the concept of a mortgage. A lender fully expects—and is contractually and legally obligated, see *supra* note

3—to take title to the collateral in the event of a default. The collateral thus more than merely "compensates" a lender who acquires it, *id.*; it is an integral part of the original secured transaction. As such, it should qualify as a "return" of "any part of the property" under § 3663A(b)(1)(B)(ii).

Nor can the Solicitor General avoid the plain language of the introduction to the offset provision, which necessarily contemplates the use of substitute property when the return of the property lost is "impossible, impracticable, or inadequate." *Samantar* v. *Yousuf*, 560 U.S. 305, 319 (2010) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole." (quoting *United States* v. *Morton*, 467 U.S. 822, 828 (1984))). In the end, the better textual reading belongs to Mr. Robers. "Any part of the property" was returned when the houses were returned, and the value of those houses, as of the date of their return, offsets the restitution order in this case.

B. The Structure of the MVRA Confirms That the Property That is Taken From a Lender in a Mortgage-Fraud Case is Returned When the Lender Takes Title to the Foreclosed Homes.

The Solicitor General contends that § 3663A "determines the *amount* of restitution a defendant may be required to pay to compensate his victim's losses while Section 3664 . . . delineates [p]rocedure[s] for issuing order[s] of restitution." Br. Resp't 22 (quoting *Hughey* v. *United States*, 495 U.S. 411, 418 (1990) (internal quotation marks omitted) (brackets in original)). Thus, while the Solicitor General concedes that "an in-kind payment of substitute property (such as collateral)" has "value," and further asserts that such a payment "may be credited against a defendant's ul-

timate restitution obligation," Br. Resp't 24, he disagrees that such a payment entitles the defendant to an offset under § 3663A(b)(1)(B)(ii). The Solicitor General is wrong for several reasons.

1. As a threshold matter, the Solicitor General's artificial construct does not answer the fundamental question of when courts should value the return of collateral; that is, at the time of the return of the collateral or at the time of the lenders' ultimate sale to a third party. There is no reason that a sentencing court should not value a return of in-kind property to the victim at the time it was returned. To do otherwise would, as here, unfairly allow the victim to determine value by disposing of the assets at whatever time and whatever price the victim saw fit.

2. *Hughey* does not stand for the proposition that *only* § 3663A establishes the amount of restitution; it stands for the proposition that *both* § 3663A and § 3664 establish the amount of restitution. 495 U.S. at 418. While it is true that this Court stated that § 3663A(b)'s predecessor, 18 U.S.C. § 3579(b), established "the *amount* of restitution that courts can award," it did so because the Solicitor General had argued (incorrectly) that § 3579(b)'s only purpose was to "designate *who* is entitled to restitution . . . ." *Id.* at 417-18. Two paragraphs later, however, this Court *quoted* § 3664's predecessor, 18 U.S.C. § 3580, for the proposition that § 3580(a) set forth considerations "for 'determining whether to order restitution under section 3579 of this title *and the amount of such restitution.*'" *Id.* at 418 (emphasis added). So *Hughey* cannot stand for the proposition that § 3664's predecessor had nothing to do with determining "the amount of restitution" because, by its own terms, that

is exactly what the statute did.[4] See also S. Rep. No. 104-179, at 20 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 933 ("The procedures contained in [§ 3664] are intended to provide a streamlined process for the determination of both the amount of restitution owed to each victim and the terms of repayment based on a reasonable interpretation of the defendant's economic circumstances.").

3. The Solicitor General misunderstands the relationship between § 3663A and § 3664 when he suggests that the omission of an in-kind provision in § 3663A indicates that Congress did not intend such payments to be included in the calculation of an offset. Br. Resp't 23. This is so because, in § 3663A(d), Congress incorporated § 3664 in its entirety. Having incorporated § 3664 into § 3663A, Congress had no need to include identical and redundant language in each statute. See, *e.g.*, *Regan* v. *Time, Inc.*, 468 U.S. 641, 697 (1984) (recognizing Congress's passage of one provision to "excise the surplusage" of another section).

4. The Solicitor General's assertion that § 3664 allows for "credits," Br. Resp't 23-24, 28-30, is wrong and atextual. The word "credit" does not appear in § 3664, and the cited subsections, §§ 3664(f)(1)(B) and (j)(2), are far narrower than the Solicitor General's concept of "credits." Br. Resp't 24.

Section § 3664(f)(1)(B) merely provides that a restitution order may not be reduced by insurance (or sim-

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[4] The language from § 3580(a) quoted in *Hughey* is no longer included in § 3664. The statute was amended in 1996. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 206(a), 110 Stat. 1214, 1232. The Solicitor General sensibly admits that the provisions are "substantively identical." Br. Resp't 22.

ilar) payments to a victim. So, if a victim has a $10,000 necklace stolen, and an insurance policy covers $5,000 of the loss, the defendant still owes $10,000 ($5,000 to the victim; and $5,000 to the insurance company victim). 18 U.S.C. § 3664(j)(1). Section 3664(f)(1)(B) does not provide for a "credit" to the restitution order—it simply ensures that the defendant pays the proper party.

Section 3664(j)(2) is similarly narrow because: (1) it provides for a "credit" only for "any amount *later* recovered" by the victim; and (2) it is limited to "compensatory damages for the same loss" recovered in a federal or state civil proceeding. The collateral in this case was returned prior to the entry of the restitution order, J.A. 148-49, and the proceeds of the later sales were not "compensatory damages" because they were not "ordered to be paid" in a civil suit. See *Black's Law Dictionary* 445 (9th ed. 2009) (defining "damages"). Thus, § 3664(j)(2) would not allow for a "credit" against Mr. Robers' ultimate restitution obligation on the Solicitor General's own theory.

The Solicitor General also cites two cases for the proposition that, rather than an offset to the restitution order, "a defendant would get *credit* for [a] cash payment" made prior to the restitution order. Br. Resp't 30. But the first case, *United States* v. *Bright*, 353 F.3d 1114, 1121 (9th Cir. 2004), did not grant the defendant a credit. That case actually held that funds forfeited to the government, but not returned to the victims, did *not* offset a restitution order. *Id.* The second case, *United States* v. *McDaniel*, 398 F.3d 540, 554-55 (6th Cir. 2005), simply ignores the word "later" in § 3664(j)(2).

5. The Solicitor General's reading of § 3663A and § 3664 would also create a serious anomaly. Because the "in-kind" provision of § 3664 is expressly limited

to post-sentencing payments, the Solicitor General's reading means that Congress intended subsequent in-kind payments to reduce a restitution order, but not in-kind payments made prior to the entry of the restitution order. Br. Resp't 23-24. That cannot be correct. If anything, Congress wanted to encourage pre-sentencing payments in order to compensate victims for their losses as quickly and completely as possible (which is the purpose of the statute). 18 U.S.C. § 3664(f)(1)(A). Refusing to offset restitution orders because voluntary payments were made too early does not encourage timely repayments to victims. Moreover, such a reading runs a very real risk of double recoveries and windfalls. Under the Solicitor General's interpretation, if a defendant returns in-kind property prior to sentencing, there is no statutory mechanism to *ensure* that he gets "credit" for the return because the district court's authority under § 3664(f)(4)(A) is discretionary, not mandatory.

The Solicitor General's argument is also counterintuitive in that it would prohibit offsets for the return of collateral under § 3663A(b)(1)(B)(ii), but allow them under an incorrect and atextual concept of "credits." But "the best evidence of Congress's intent is the statutory text," *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2583 (2012), and Congress included both the offset provision and the in-kind provision in the text of the MVRA. There is no reason to read into the statute a system of "credits" when the plain text, by requiring offsets, does exactly what that system would do.

In the end, the Solicitor General is wrong about the reach of § 3664(f)'s in-kind payment provision. That provision confirms that an in-kind payment, such as the return of collateral property that secures a mortgage loan, offsets the restitution order as of the date

of its return. That is the only plausible interpretation of the MVRA when its provisions are read as a whole, in context, and in light of the overall statutory scheme. See *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting *Davis* v. *Mich. Dep't of Treas.*, 489 U.S. 803, 809 (1989))).

C. The MVRA Requires Restitution for Losses Proximately Caused by the Defendant.

The Solicitor General maintains that proximate-cause principles "have no bearing" on the interpretation of the offset provision, Br. Resp't 34, even though the MVRA expressly provides that a defendant must pay restitution only to victims who are "directly and proximately harmed" by his actions. 18 U.S.C. § 3663A(a)(2). Congress did not have to include a proximate-cause requirement in every subsection of the MVRA to establish that a defendant is liable only for losses he proximately caused. Cf. *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2525-27 (2013).

The Solicitor General further claims that, even if proximate-cause principles apply, Mr. Robers proximately caused the losses at issue in this case. In doing so, however, the Solicitor General erroneously conflates but-for causation with proximate causation. Br. Resp't 35 ("[A]bsent [Mr. Robers'] fraudulent loan applications, the victim lenders would not have loaned the money in the first place." (quoting J.A. 155)). Rather than explain how Mr. Robers' fraud proximately caused the lenders' losses, the Solicitor General lists several "different ways" courts have characterized the inquiry. Br. Resp't 33. The prob-

lem is that each "articulation," Br. Resp't 32, supports some limit on Mr. Robers' responsibility for the lenders' losses.

First, there is no "direct relationship," *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 10 (2010), between the Great Recession in the real-estate market and Mr. Robers' fraudulent mortgage applications. Even assuming that normal price fluctuations are foreseeable, Br. Resp't 35, the unprecedented decline in the real-estate market was not. Alan Greenspan, *Never Saw It Coming*, Foreign Affairs (Oct. 15, 2013), http://www.foreignaffairs.com/articles/140161/alan-greenspan/never-saw-it-coming.

Second, the Solicitor General does not dispute—nor could he—that the intervening collapse in the market was a "superseding" cause of the victims' losses. Br. Resp't 33. The United States has taken a similar position in other litigation. See *Fifth Third Bank* v. *United States*, 518 F.3d 1368, 1376 (Fed. Cir. 2008); see also Brief of Defendant-Appellant, the United States, *Fifth Third Bank*, 518 F.3d 1368 (Nos. 2006-5128, -5129), 2006 WL 4030155 ("[B]ecause the movement of the thrift stock price index intervened between the breach and the 'but for' conversion, the breach was not and could not have been the proximate cause of the reduced conversion proceeds."). This Court has also recognized that such unusual market declines break the causal chain. See *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 344-45 (2005) (when victims' losses are "brought about by business conditions or other factors," there is no "basis for recovery" (quoting W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 110, at 767 (5th ed. 1984))). Where, as here, the lender's "loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the [lend-

er's] loss was caused by the [defendant's] fraud decreases." *Lentell* v. *Merrill Lynch & Co.*, 396 F.3d 161, 174 (2d Cir. 2005) (quoting *First Nationwide Bank* v. *Gelt Funding Corp.*, 27 F.3d 763, 772 (2d Cir. 1994)).

Despite the express applicability of proximate-cause principles and these precedents, the Solicitor General nonetheless contends that Mr. Robers "should bear the risk of forces beyond his control." Br. Resp't 36-37 (quoting *United States* v. *Rhodes*, 330 F.3d 949, 954 (7th Cir. 2003)). But Congress has already made that policy decision. Under the MVRA, the defendant must pay restitution only for the victim's losses proximately caused by his actions. When the MVRA's offset provision is "appl[ied] . . . as it is written," *Burrage* v. *United States*, 134 S. Ct. 881, 892 (2014), the court must value the collateral at the time it is returned to the lender. Further, the imposition of a ruinous order of restitution in this criminal proceeding, see Br. Resp't 40, based upon the vagaries of the real-estate market and the subsequent strategic actions of the lenders, would raise grave due process concerns, see *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983), which this Court strives to avoid, *Jones* v. *United States*, 526 U.S. 227, 239-40 (1999).

D. Mr. Robers' Reading of the Statute is Both Pragmatic and Workable.

The Solicitor General claims that Mr. Robers has failed to "spell out" *how* courts should value the collateral at the time it is returned. Br. Resp't 25. But the sentencing court may obtain and rely on any information that it deems necessary "to exercise its discretion." 18 U.S.C. § 3664(a); see also *supra* note 2. That information may come in many forms, such as expert witness appraisals, historical price estimates,

earlier or later sale prices, or general market trends.[5] See, *e.g.*, *United States* v. *Snow*, 663 F.3d 1156, 1159-60 (10th Cir. 2011) ("certified appraiser"); *United States* v. *Gossi*, 608 F.3d 574, 576-77 (9th Cir. 2010) (appraisal); *Holley*, 1998 WL 414260, at *1 (later sale).

Despite these sources of information, the Solicitor General suggests that it is simply too difficult for sentencing judges to determine property values at an earlier time. Br. Resp't 26-27. Yet courts frequently do just that without any trouble: if a landowner contracts to sell Blackacre and then breaches, the court must determine Blackacre's fair market value on the date of breach to calculate the would-be buyer's damages. Moreover, the Solicitor General admits that his preferred methodology may not accurately value a victim's loss because the victim may sell collateral at a price that does *not* reflect its fair market value. Br. Resp't 35 n.5 (citing *Boccagna*, 450 F.3d at 109-20). Far from leading to "relative ease," Br. Resp't 26, that approach would still require the sentencing court to exercise its discretion.

The Solicitor General further recognizes the MVRA's concern with avoiding "prolonged" sentencing hearings. Br. Resp't 26-28. Yet he cites *Dolan* v. *United States*, 560 U.S. 605, 611-15 (2010), which shows that other purposes of the MVRA may some-

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[5] The Solicitor General thus mischaracterizes Mr. Robers' argument as suggesting that courts must use the foreclosure price to calculate the value of the collateral at the time it is returned. Br. Resp't 25. However, in its discretion, a district court could consider the amount of a lender's credit bid when it values the collateral. *See United States* v. *Tucker*, 404 U.S. 443, 446 (1972) (The sentencing judge is "largely unlimited either as to the kind of information he may consider, or the source from which it may come.").

times permit lengthy proceedings. *Dolan*, however, permitted prolonged proceedings to protect victims from actions beyond their control—a more sensible idea than allowing the victims themselves to prolong the proceedings, as the Solicitor General would here.

The Solicitor General argues that lenders typically foreclose and resell "long before a defendant is convicted and sentenced." Br. Resp't 27. But his citation for that point actually undermines it, confirming that a significant number of foreclosed properties do not sell within three or four years after lenders take title. Elizabeth Renuart, *Toward a More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 Loy. Consumer L. Rev. 562, 570 n.47 (2012) (over 23,000 homes acquired by lenders at foreclosure sales in 2006 were not resold by the second quarter of 2010). Moreover, the article only concerns foreclosures that predated the Great Recession, and its statistics are contradicted by the facts in this case. Br. Pet'r 9-10 (Inlet Shores property was resold 33 months after foreclosure).

Finally, Mr. Robers' interpretation would not require an offset to the restitution order for any gain in the collateral's value after its return to the lender. Cf. Br. Resp't 28-29. Just as a defendant does not cause loss once collateral is returned, neither does he cause gain. The offset provision values the collateral on the date of its return. Under the MVRA's plain

terms, whatever happens after that date is irrelevant for purposes of restitution.

E. Principles of Mortgage Law Confirm That Courts Must Grant Offsets Once Victims Recoup Collateral.

The Solicitor General contends that the MVRA's meaning "should not be distorted based on principles of mortgage law." Br. Resp't 37-38. That premise is false—rather than distorting the MVRA, mortgage law provides a helpful backdrop to avoid oversimplification and inaccuracy in setting restitution orders.

Unlike unsecured creditors, a mortgage lender obtains a bundle of rights: here, the right to cash payments from Mr. Robers, but also the right to foreclose on the houses and take title if those payments were not made. See *Reese* v. *Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1216 (11th Cir. 2012) (a mortgage "is not a promise to pay a debt," but a guarantee that "a lender can take" certain collateral "if a debtor does not fulfill a payment obligation."). Mr. Robers too obtained a set of rights (including possession and the right of redemption) in addition to the loan proceeds, which the bank wired directly to the seller and which Mr. Robers never possessed as cash. The Solicitor General's artificial distinction between the "money" the mortgagees supposedly lent and the "houses that petitioner purchased," Br. Resp't 16, is thus wholly at odds with the basics of a mortgage transaction.

The Solicitor General has no answer to Mr. Robers' point that each lender preserved its right to foreclose and waived its right to pursue Mr. Robers for a cash deficiency judgment. Br. Pet'r 19-20. Further, the

lenders bargained for—and exercised—their right to credit bid for the houses at the sheriff's sales, which is "the equivalent of a cash purchase" by the lender. *In re Spillman Dev. Grp., Ltd.*, 401 B.R. 240, 253 (Bankr. W.D. Tex. 2009), *aff'd*, 710 F.3d 299 (5th Cir. 2013).[6] The Solicitor General also ignores this Court's prior determination that a credit bid protects a lender's view of fair market value.[7] The Solicitor General's comment that the lenders "did not own [the houses] before petitioner's fraud" and "had no intention of ever buying" them, Br. Resp't 12, thus misses the point. The lenders contractually bound themselves to the properties and had every intention of taking title in the event of default.

Moreover, even if a credit bid were considered an arm's-length transaction rather than the exercise of a bargained-for right, it would be "the same as if the secured creditor has paid cash and then immediately *reclaimed* that cash *in payment of the secured debt.*" *In re HNRC Dissolution Co.*, 340 B.R. 818, 824-25 (Bankr. E.D. Ky. 2006) (emphasis added). Thus, the

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[6] The Solicitor General recently recognized that a secured creditor has a closer connection to the property than a third party, and that credit-bidding is thus "intended to prevent . . . 'the absurdity of making A pay B when B owes A.'" Brief for the United States as Amicus Curiae Supporting Respondent at 29, *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065 (2012) (No. 11-166) (quoting *Citizens Bank* v. *Strumpf*, 516 U.S. 16, 18 (1995)).

[7] "The ability to credit-bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price. It enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan." *RadLAX Gateway Hotel, LLC*, 132 S. Ct. at 2070 n.2.

credit bid transaction would itself be the "return" of cash that the Solicitor General claims was required.

To consider these circumstances does not give the offset provision "a special meaning in the mortgage-fraud context." Br. Resp't 38. To the contrary, doing so simply applies the principles of § 3663A to Mr. Robers' situation. The "common law" of mortgages, and the state legislation which incorporated it, "confirms [a] characterization" of the text of § 3663A as treating real estate collateral as a "return" of cash loan proceeds. *Pasquantino* v. *United States*, 544 U.S. 349, 356 (2005). Likewise, the fact that a mortgage lender considers collateral to be repayment is relevant to the interpretation of the MVRA, the "primary goal" of which is "to compensate victims for their losses." Br. Resp't 40.

F. In the Alternative, the Rule of Lenity Applies.

While the Solicitor General urges that the rule of lenity should not apply because the "statutory text's meaning is plain," Br. Resp't 42, that claim is belied by his recognition that the offset provision is ambiguous without resort to "the context of [§] 3663A," Br. Resp't at 18, and by his unsuccessful attempts to square his interpretation with surrounding statutory provisions and accepted mortgage law principles. See *Burrage*, 134 S. Ct. 892 (Ginsburg, J., concurring) ("[W]here there is room for debate, one should not choose the construction 'that disfavors the defendant.'" (quoting *Burrage*, 134 S. Ct. at 891)). Because Mr. Robers' interpretation would favor the vast majority of mortgage fraud defendants, this Court could

apply the rule of lenity. But there is no need. Read in "context," as the Solicitor General agrees it must be, § 3663A(b)(1)(B)(ii) entitles Mr. Robers to an offset for the mortgage collateral he returned.[8]

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[8] Repeating a claim made in opposition to certiorari, the Solicitor General incorrectly claims that plain error review is required. Br. Resp't 42 n.7. The issue of restitution and how much the district court should order was well argued and preserved below. "Once a federal claim is properly presented, a party can make any argument in support of that claim." *Yee* v. *City of Escondido*, 503 U.S. 519, 534-35 (1992). The Seventh Circuit recognized that the issue was not forfeited and addressed it *de novo*. Plain error review is not warranted.

CONCLUSION

Mr. Robers respectfully requests that the Court vacate the judgment of the court of appeals and remand for a redetermination of the restitution amount.

Respectfully submitted,

JEFFREY T. GREEN
JACQUELINE G. COOPER
DAVID R. KUNEY
JEFFREY S. BEELAERT
ADAM N. HALLOWELL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

JOSH C. HESS
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree St., N.E.
Atlanta, GA 30309

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV. S. CT. PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611

CHRISTOPHER DONOVAN*
PRUHS & DONOVAN, S.C.
757 N. Broadway
Milwaukee, WI 53202
Donovanc34@hotmail.com
(414) 221-1950

JONATHAN E. HAWLEY
Chief Federal Public Defender
DANIEL T. HANSMEIER
Assistant Federal Public Defender
FEDERAL PUBLIC DEFENDER'S OFFICE
CENTRAL DISTRICT OF ILLINOIS
600 E. Adams Street, 2d Floor
Springfield, IL 62701

Counsel for Petitioner

February 14, 2014

* Counsel of Record